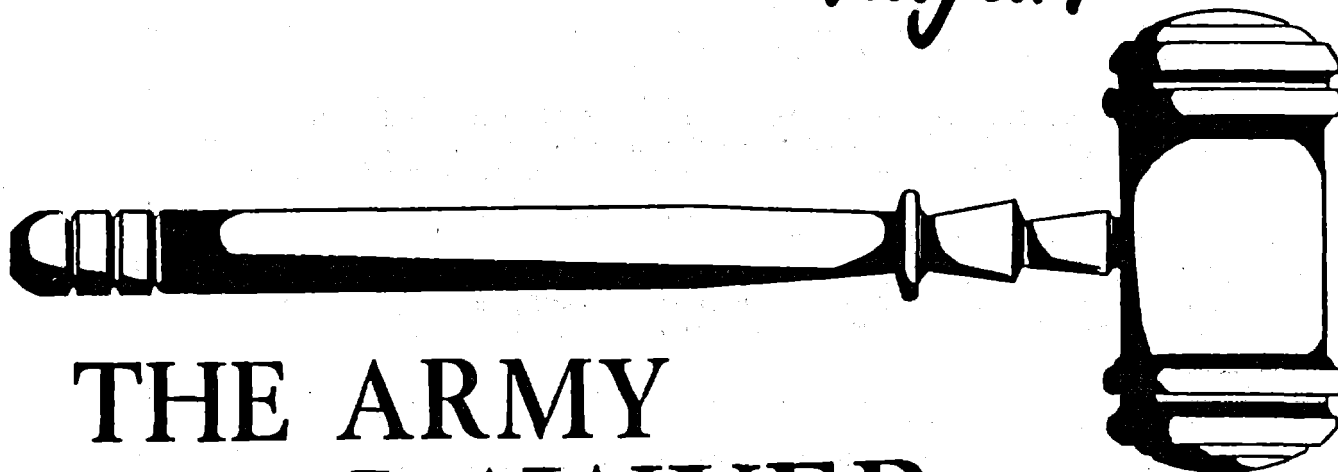


Lujan



THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-191

November 1988

Table of Contents

Memorandum of Law: The Use of Lasers as Antipersonnel Weapons	3
Articles	
Absolute Immunity for State-Law Torts Under <i>Westfall v. Erwin</i> : How Much Discretion is Enough?	5
<i>Captain Karl R. Rabago</i>	
The New AR 15-6	14
<i>Captain D. Ben Tesdahl</i>	
Practical Considerations of <i>United States v. Holt</i> : Use of the Accused's Answers During the Providence Inquiry as Substantive Evidence	20
<i>Captain James L. Pohl</i>	
USALSA Report	24
<i>United States Army Legal Services Agency</i>	
The Advocate for Military Defense Counsel	
DAD Notes	24
Keeping a Perspective; Prior Arrest by Any Other Name is Just as Inadmissible; The Error of Efficacy; DICTUM: The Tail That Wags the Dog	
Government Appellate Division Note	27
<i>United States v. Gipson</i> : A Leap Forward or Impetus for a Step Backward?	
<i>Captain Randy V. Cargill</i>	
Trial Defense Service Notes	31
Ethics in Action: The ARPC Applied	
<i>Lieutenant Colonel Michael C. Denny</i>	
Precluding the "Automatic" Application of the Administrative Reduction Provision of Article 58a, UCMJ in Courts-Martial	34
<i>Captain Kathy J.M. Peluso</i>	
Contract Appeals Division—Trial Note	35
Hindsight-Litigation That Might Be Avoided	
<i>Major Edward J. Kinberg</i>	

TJAGSA Practice Notes	37
<i>Instructors, The Judge Advocate General's School</i>	
Criminal Law Notes	37
Is Absence Without Leave a Continuing Offense?; The Court of Military Appeals Expands False Official Statement Under Article 107, UCMJ; Pretrial Confinement Pending a Government Appeal; Withdrawal of Command Sponsorship for a Potential Defense Witness	
Contract Law Note	43
Bankruptcy and Government Contract Law	
Legal Assistance Items	45
Consumer Law Notes (Creditors Made Subject to Credit Reporting Requirements); Tax Notes (Air Force Officer Loses Tax Court Case, Sixth Circuit Upholds Collateral Attack on Divorce Decree)	
Claims Report	47
<i>United States Army Claims Service</i>	
Management Strategies for the New Claims Judge Advocate	47
<i>Captain Sharon K. MacKenzie</i>	
Claims Notes	49
Personnel Claims Notes (Receipt and Transfer of Personnel Claims, Matching Discontinued China and Crystal (2))	
Personnel, Plans and Training Office Note	49
<i>Personnel, Plans and Training Office, OTJAG</i>	
Guard and Reserve Affairs Items	50
<i>Judge Advocate Guard and Reserve Affairs Department, TJAGSA</i>	
Reserve Component Promotions Update	50
<i>Dr. Mark Foley</i>	
GRA Notes (New National Guard Representative for GRA, On-Site Update, Active Guard/ Reserve Program)	52
CLE News	52
Current Material of Interest	55

The Army Lawyer (ISSN 0364-1287)

Editor

Captain Matthew E. Winter

The Army Lawyer is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. The opinions expressed by the authors in the articles, however, do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed doubled spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles should also be submitted on floppy disks, and should be in either Enable, Word Perfect, MultiMate,

DCA RFT, or ASCII format. Articles should follow *A Uniform System of Citation* (14th ed. 1986) and *Military Citation* (TJAGSA, July 1988). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*.

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Issues may be cited as *The Army Lawyer*, [date], at [page number].

Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903-1781.

Memorandum of Law: The Use of Lasers as Antipersonnel Weapons

On 29 September 1988, The Judge Advocate General, in compliance with Department of Defense Instruction 5500.15 (Review of Legality of Weapons Under International Law), issued a memorandum of law concerning the legality of the use of lasers as antipersonnel weapons. The Judge Advocate Generals of each department are required to conduct reviews of "all weapons intended to meet a military requirement" to ensure that their intended use "is consistent with the obligations assumed by the United States under all applicable international laws, including treaties to which the United States is a party and customary international law, in particular the laws of war." This most recent memorandum does not constitute a review of a particular weapon, but instead addresses the use of a type of weapon for a particular purpose: lasers as antipersonnel weapons. The fundamental issue in the review is whether the use of a laser to blind an enemy soldier would cause unnecessary suffering and therefore be unlawful. The memorandum notes that it would be legally inconsistent if a determination was made that "a soldier legally could be blinded ancillary to the lawful use of a laser rangefinder or target acquisition lasers against material targets, but could not be attacked individually." Thus, The Judge Advocate General concludes that the use of a laser as an antipersonnel weapon is lawful. The text of the entire memorandum is reprinted below.

29 September 1988

MEMORANDUM OF LAW

SUBJECT: Use of Lasers as Antipersonnel Weapons

1. **Summary.** This memorandum considers the legality of the use of a laser as an antipersonnel weapon. It concludes that such use would not cause unnecessary suffering when compared to other wounding mechanisms to which a soldier might be exposed on the modern battlefield, and hence would not violate any international law obligation of the United States. Accordingly, the use of antipersonnel laser weapons is lawful.

2. **Background.** Department of Defense Instruction 5500.15 requires that a weapon or munition undergo a legal review during its development and prior to acquisition to ensure that the weapon or munition in question complies with the international law obligations of the United States. This review is to be conducted by the Judge Advocate General of the Service sponsoring the weapon/munition. This memorandum does not constitute a review of a particular weapon, but addresses a basic question regarding the legality of the use of lasers for antipersonnel purposes. This memorandum has been coordinated with the International Law Divisions of the Offices of the Judge Advocates General of the Navy and Air Force, each of which concurs in its contents and conclusion.

3. **Previous Opinions.** Each of the Judge Advocates General has proffered opinions relating to the legality of lasers. Navy (5710 Ser 103/572 dated 4 September 1984 [C]) and Army (DAJA-IA 1984/0116 dated 24 December 1984 [S]) opinions concluded that injury to combatants secondary or ancillary to the use of a laser for rangefinding, target acquisition, or other antimateriel purposes is lawful, and that blindness *per se* could not be a basis for concluding that a laser violates the law of war prohibition against weapons that may cause unnecessary suffering. Opinions by the Air Force (JACI dated 21 November 1985 [S] and Navy (5800 Ser 103/5356 dated 19 February 1986 [S]) concluded that the use of lasers to produce flash effects (the temporary induction of a visual impairment) to combatants would not violate the law of war obligations of the United States. While they did not have a direct impact on the contents or conclusions of this memorandum, related legal opinions prepared by a close ally of the United States and another agency of the United States were considered, as were threat briefings regarding the actions, programs, and possible intent of potential opponents of the United States.

4. **Law of War.** No specific rule prohibits laser weapons. In fact, antipersonnel weapons are designed specifically to kill or disable enemy combatants and are not unlawful because they cause death, disability, pain or suffering. This principle is tempered by the law of war obligations of the United States relating to the legality of weapons or munitions, contained in the Annex to Hague Convention IV Respecting the Laws and Customs of War on Land of October 18, 1907 (36 Stat. 2277; TS 539; 1 Bevans 631). In particular, article 23(e) prohibits the employment of "arms, projectiles, or material calculated to cause unnecessary suffering." There is no internationally accepted definition of "unnecessary suffering." In fact, an anomaly exists in that while it is legally permissible to kill an enemy soldier, in theory any wounding should not be calculated or intended to cause unnecessary suffering. In endeavoring to reconcile the two, in considering

the customary practice of nations during this century, and in acknowledging the lethality of the battlefield for more than a century, certain factors emerge that are germane to this opinion:

(a) No legal obligation exists or can exist to limit wounding mechanisms in a way that permits lawful killing while requiring that wounds merely temporarily disable, that is, that the effects of wounds do not extend beyond the period of hostilities; and

(b) In considering whether a weapon may cause unnecessary suffering, it must be viewed in light of comparable wounding mechanisms extant on the modern battlefield rather than viewing the weapon in isolation.

(c) The term "unnecessary suffering" implies that there is such a thing as "necessary suffering," i.e., that ordinary use of any militarily effective weapon will result in suffering on the part of those against whom it is employed.

(d) The rule does prohibit deliberate design or alteration of a weapon solely for the purpose of increasing the suffering of those against whom it is used, including acts that will make their wounds more difficult to treat. This is the basis for rules against poisoned weapons and certain small caliber hollow point ammunition.

5. **Recent Negotiations.** Law of war provisions to regulate or prohibit laser weapons have been considered over the past fifteen years; none have been accepted by the community of nations. Separate weapons discussions were held in conjunction with the 1974-1977 Diplomatic Conference on Humanitarian Law. Although the issue of laser weapons was raised by a small number of nations, all weapons questions were deferred save and except incorporation of article 23(e) of the Annex to Hague IV of 1907 into article 35(2) of the 1977 Protocol I Additional to the 1949 Geneva Conventions for the Protection of War Victims. At the subsequent United Nations Conference on Certain Conventional Weapons, held in Geneva from 1978 to 1980, the subject of regulation of laser weapons was again raised by a very small minority of nations but, owing to lack of support, was not actively pursued. In the course of the XXV International Conference of the Red Cross (Geneva, October 1986), Sweden and Switzerland offered a resolution condemning the blinding effect of laser weapons; that resolution enjoyed little support, was strongly resisted by some nations, and was not adopted by the conference. In April 1988 Sweden again endeavored to raise the issue, though in substantially modified form. It acknowledged the legality of the use of lasers to produce flash effects to combatants; accepted the lawfulness of the use of lasers for rangefinding, target acquisition, and similar military purposes; and also accepted the legality of blinding of enemy combatants incidental to the use of a laser for the above-cited purposes. Sweden's most recent effort proposed to prohibit use of lasers as antipersonnel weapons *per se*. This proposal, offered first on an informal basis to delegates to the United Nations Committee on Disarmament in Geneva on 18 April 1988, and subsequently to the United Nations Special Session on Disarmament III in New York in June, 1988, met with no success in either instance. This history not only indicates a lack of international support for any prohibition or regulation on the use of lasers as antipersonnel weapons, but simultaneously serves as an acknowledgment of the legality of such use under the current law of war; were such use illegal *per se*, no further regulation would be necessary. That said, however, it is beneficial to consider laser weapons and their effects in the context of the current law of war to understand the basis for their legality.

6. Lasers. Lasers operate in a wide variety of wavelengths and exposure durations. The susceptibility of the human eye and skin is dependent on a number of physical and operational factors, including the output characteristics of the laser source and the conditions of the atmosphere between the laser and the target (rain, sleet, snow, fog, dust, particulates and aerosols, or atmospheric turbulence produced by reradiation of the heat generated by the sun) which can cause considerable attenuation or reduction of the light intensity at the target. If the target is the human eye or skin surface, the laser may produce minimal effect at low levels, from veiling glare or dazzle to the eye or the bare perception of warmth on the skin, to the most severe effects of severe eye and skin burns.

At high levels of laser irradiation the damage mechanism which predominates is a thermal phenomena, where light energy from the laser is converted by absorption of the energy and conversion of this energy to heat. The human eye is particularly susceptible to laser light in the visible and near infrared portions of the electromagnetic spectrum because of the focussing properties of the human cornea and lens. Laser light incident on the cornea in this wavelength region (commonly referred to as in-band to the eye) is focussed to a very small retinal spot increasing the energy per unit area on the retina by a factor of 100,000 times. At these levels the high concentration of light is sufficient to produce irreversible damage by a mechanism known as photocoagulation. At these high levels of laser irradiation the effects on the human eye may be the appearance of a large retinal burn with accompanying hemorrhage into the portion of the eye behind the lens. As the incident laser energy is reduced, the hemorrhage is no longer a factor and the size of the retinal burn diminishes. As the laser exposure level falls below the threshold for retinal burn, the effect is one of bright light exposure producing a dazzle or glare phenomenon. In general the factors of importance in laser-induced trauma of the eye follow those of exposure to any intense light source, including the sun. Laser injury threshold doses for the human eye vary as a function of the exposure duration to the eye by the laser and the wavelength of the laser output. Lasers can produce corneal burns, retinal burns and flash effects. The degree of injury is related to the operation characteristics of the laser source and the condition of the atmosphere which determines the amount of energy reaching the eye and the eye itself. Eye factors may include the direction of the eye with reference to the laser, the age of the individual, and the degree of pupillary dilatation or light collection and adaptation level (for lasers operating in the visible or near infrared). Not all individuals exposed to incident laser irradiation will be permanently blinded.

Those lasers which produce wavelengths in the ultraviolet and the infrared are known as out-of-band and produce mainly surface effects to the eye (cornea and lens) and skin. These effects may vary from large corneal burns to deep, full thickness skin burns.

7. Issue. This memorandum is not concerned with skin burns. Incendiary weapons have been in use by most nations throughout the history of war. Attempts at prohibiting or regulating their use against enemy combatants were specifically rejected by national delegations attending the 1978-1980 United Nations Conference on Certain Conventional Weapons. Neither is it concerned with eye injury not of a permanent nature, as it would be compatible to and generally less damaging than other conventional wounding mechanisms. The fundamental issue with which this review is concerned is whether the use of a laser for the purpose of blinding an enemy soldier would constitute unnecessary suffering. The conclusion is that it would not.

8. Rationale. Blinding is no stranger to the battlefield. Records on eye injury to U. S. military personnel in World War I and II, Korea, and the Vietnam War reveal that permanently disabling eye wounds have resulted from bomb, shell, and hand grenade fragments, bullets, landmines, other mechanisms, poisonous gas, and battlefield debris such as dirt, rocks, and glass. Like lasers, eye injury caused by these mechanisms does not necessarily result in death or permanent blindness. Unlike lasers, however, injury from each of these mechanisms frequently results in death; therefore antipersonnel laser injury is more humane than injury caused by comparable weapons.

While some laser injury can lead to permanent blindness, the extent of injury is subject to the myriad of factors previously listed. As with defense against chemical agents or conventional munitions, potential laser injuries can be minimized with the utilization of appropriate protective equipment and defensive actions.

The weapons under consideration have not been designed with the sole purpose of producing permanent injury to combatants. As with other weapons, even were a laser developed that would, in most cases, cause a permanently disabling wound, it is lawful because its increased power has militarily useful effects, such as increased range against other sensors.

Some laser injury may lead to permanent blindness. The issues are whether the intentional use of a laser for the purpose of blinding necessarily should be considered as causing unnecessary suffering in that its effect, if permanent, outlasts the duration of the hostilities, and whether permanent blindness can or should be regarded as more severe than other forms of permanent disability. The following addresses these matters.

Permanent blinding, again, is not unique to lasers, nor is a permanently disabling wound a remote occurrence in modern war. Many wounds lead to permanently disabling effects. Modern weapons are not designed to temporarily incapacitate. Wounds that last beyond the duration of hostilities are commonplace, and there exists no law of war obligation to design weapons along lines to the contrary. The prohibition contained in article 23(e) of the Annex to Hague IV limiting the employment of "arms, projectiles, or material calculated to cause unnecessary suffering" must be balanced against the necessity for destructive power adequate to meet a variety of threats at a variety of ranges and in a variety of circumstances, such as combatants in bunkered positions or armored vehicles, or at extended range. The lawful attack of enemy combatants inevitably will cause—and has caused—vast numbers of permanently disabling wounds, including blindness. U. S. Government disability tables regard permanent blindness as equal to but not greater than other forms of permanent disability.

Proposals to conclude that the use of a laser to intentionally blind would result in unnecessary suffering would lead to a contradiction in the law in that a soldier legally could be blinded ancillary to the lawful use of a laser rangefinder or target acquisition lasers against materiel targets, but could not be attacked individually. Thus enemy soldiers riding on the outside of a tank lawfully could be blinded as the tank is lased incidental to its attack by antitank munitions; yet it would be regarded as illegal to utilize a laser against an individual soldier walking ten meters away from the tank. No case exists in the law of war whereby a weapon lawfully may injure or kill a combatant, yet be unlawful when used in closely-related circumstances involving other combatants.

9. Conclusion. For the foregoing reasons, it is concluded that the use of lasers as antipersonnel weapons would not cause unnecessary suffering nor otherwise constitute a violation of the international legal obligations of the United States. Accordingly, the use of a laser as an antipersonnel weapon is lawful.

/s/

HUGH R. OVERHOLT
Major General, USA
The Judge Advocate General

Prepared by:

W. Hays Parks
Chief, International Law Team
International Affairs Division
(202) 695-3170

Coordinated with:

Lieutenant Colonel B. M. Carnahan, JAGC, USAF
International Law Division
Office of the Judge Advocate General
Department of the Air Force (AF-JACI)
(202) 695-9633

Captain W. M. Schachte, Jr., JAGC, USN
Major W. F. Warriner, USMC
International Law Division
Office of the Judge Advocate General
Department of the Navy (NJAG-10)
(202) 697-5406

Absolute Immunity for State-Law Torts Under *Westfall v. Erwin*:¹ How Much Discretion is Enough?

Captain Karl R. Rabago*
Department of Law, United States Military Academy

Introduction

The plaintiff who seeks to maintain an action in tort against a federal employee has basically two choices. First, after complying with various procedural requirements, the plaintiff may initiate suit under the Federal Tort Claims Act (FTCA) against the United States.² The act is a waiver of sovereign immunity and, in spite of the existence of exceptions to its coverage,³ has generally been interpreted broadly.

The other alternative available to the plaintiff is a suit against the employee in his individual capacity based upon either state-law⁴ or constitutional⁵ tort. One of the employee's first lines of defense against such actions is official immunity.⁶ Fairly distinct bodies of law have developed for immunity in suits alleging constitutional torts⁷ and those based in state-law. Courts generally recognize absolute immunity from tort actions for executive officials in quasi-judicial functions.⁸

A federal employee sued in state-law tort will seek the protection of absolute immunity. The leading Supreme Court case in the area is *Barr v. Matteo*.⁹ The case had

come to stand for the rule that a federal employee was entitled to absolute immunity against suit based in state-law tort when the actions giving rise to the suit were "within the outer perimeter of [the employee's] line of duty."¹⁰ The courts of appeals split on whether immunity also required conduct that was "discretionary" in nature.¹¹ The Supreme Court resolved this conflict in *Westfall v. Erwin*,¹² by unanimously holding that discretion was indeed a prerequisite to absolute immunity. In spite of the Court's efforts to provide some guidance for a workable definition of "discretion," the case raises serious concerns over how federal officials should function and when they can be held individually responsible for damages resulting from the performance of their duties.

Westfall v. Erwin

William Erwin, Sr., a federal employee, was a warehouseman at an Army depot in Alabama, who sustained injuries due to exposure to toxic soda ash while at the workplace. He alleged that his supervisors, also federal employees, were negligent in causing, permitting, or allowing him to inhale the soda ash. Plaintiff alleged that the ash should not

*This article was originally submitted in partial satisfaction of the requirements of the 36th Judge Advocate Officer Graduate Course.

¹ 108 S. Ct. 580 (1988). The author uses the term "state-law tort" to refer to all tort actions brought under state codified or common law.

² 28 U.S.C. §§ 1346(b), 2671-80 (1982). Section 1346(b) provides that the United States may be sued in federal district court for damages for injuries or loss of property caused by the negligent or wrongful conduct of a federal employee acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable according to the law of the place where the tort occurred. Section 2401(b) requires the tort claim to be presented within two years after it accrues to the federal agency where the tortfeasor was employed when the tort occurred. The FTCA action must be filed within six months of the agency's denial of the claim. Section 1402(b) places venue in the district where plaintiff resides or where the tort occurred.

³ 28 U.S.C. § 2680 lists areas where the United States has not waived sovereign immunity, including claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, and interference with contractual relations. The only remedy for plaintiffs alleging these torts is to sue the tortfeasor directly in state court.

⁴ Even if the action is not specifically precluded under an FTCA exception, see *supra* note 3, plaintiffs may choose suit under state law to avoid other provisions of the act, to avoid the requirement to prove the defendant acted within the scope of his employment to obtain trial by jury and the possibility of punitive damages, or simply to obtain representation by an attorney who would otherwise be limited to a statutory fee. See P. Schuck, *Suing Government* 41-43 (1983) [hereinafter *Suing Government*]. See generally Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281 (1981) [hereinafter *Suing Our Servants*]; Woolhandler, *Patterns of Official Immunity and Accountability*, 37 Case W. Res. 396 (1987); Comment, *Tort Immunity of Federal Executive Officials: The Mutable Scope of Absolute Immunity*, 37 Okla. L. Rev. 285 (1984); Jaffe, *Suits Against Governments and Officers: Damages Actions*, 77 Harv. L. Rev. 209 (1963); Mayer, *Immunity Denied to Federal Officials Failing to Perform Discretionary Duties: Estrada v. Hills*, 401 F. Supp. 429 (N.D. Ill. 1975), 35 Fed. B.J. 206 (1976).

⁵ See generally *Suing Government*, *supra* note 4; Woolhandler, *supra* note 4; Comment, *supra* note 4.

⁶ Certain statutory provisions may immunize the employee and/or substitute the United States as the defendant. These statutory immunities can be categorized according to the way in which protection is afforded. See, e.g., 21 U.S.C. § 885(d) (1982) (immunizing all officials engaged in enforcement of the Controlled Substances Act); 10 U.S.C. § 1089(a) (1982), 28 U.S.C. § 2679(b) (1982) (providing that exclusive remedy is suit against United States); 28 U.S.C. § 2676 (1982) (recovery against United States precludes subsequent suit against individual); 10 U.S.C. § 1089(f) (1982) (allowing indemnification by United States).

⁷ See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (immunity from constitutional torts granted where official is performing discretionary functions insofar as conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

⁸ See generally *Butz v. Economou*, 438 U.S. 478, 508-17 (1978); *Dorman v. Higgins*, 821 F.2d 133 (2d Cir. 1987); *Harper v. Jefferies*, 808 F.2d 281 (3d Cir. 1986); *Ryan v. Bilbey*, 764 F.2d 1325, 1328 n.4 (9th Cir. 1985).

⁹ 360 U.S. 564 (1959). The Court decided the companion case, *Howard v. Lyons*, 360 U.S. 593 (1959), at the same time. The two cases are referred to collectively as *Barr v. Matteo*.

¹⁰ *Barr*, 360 U.S. at 575.

¹¹ See *Doe v. McMillan*, 412 U.S. 306, 322 (1973) (holding that scope element alone was not the rule and suggesting a requirement for discretion). Compare *General Electric Co. v. United States*, 812 F.2d 1273, 1276-77 (4th Cir. 1987) and *Poolman v. Nelson*, 802 F.2d 304, 307 (8th Cir. 1986) (immunity attaches for all acts performed within outer perimeters of scope of duties) with *Johns v. Pettibone Corp.*, 769 F.2d 724, 728 (11th Cir. 1985) and *Araujo v. Welch*, 742 F.2d 802, 804 (3d Cir. 1984) (immunity requires scope of duties and discretionary function).

¹² 108 S. Ct. 580 (1988).

have been stored in his warehouse, and that he should have been warned of the presence and danger of the ash. Defendants removed the state court action to the United States District Court for the Northern District of Alabama.¹³

The district court granted summary judgment to the defendants on the ground that they were immune from suit as a matter of law because they were acting within the scope of their duties when the alleged negligence occurred.¹⁴ On appeal, the Court of Appeals, 11th Circuit, held that although the district court had been correct in its interpretation of the law at the time of the decision, an intervening decision in another case placed the 11th Circuit with those circuits requiring that the complained-of acts also be discretionary in nature.¹⁵ Because a genuine dispute over a material issue of fact existed as to the discretion issue, summary judgment was inappropriate and the 11th Circuit reversed the district court.¹⁶ The Supreme Court granted certiorari to resolve the dispute among the circuits on the need for discretion¹⁷ and affirmed.¹⁸

The Supreme Court began its analysis by returning to its decisions in *Barr v. Matteo*¹⁹ and *Doe v. McMillan*,²⁰ the only precedent cited in the entire opinion. In those cases, the Court explicated the original rationale for absolute immunity for government officials against suits for state-law tort. The Court recognized that immunity grew from a balancing of the values of insulating the decision-making process from the harassment of prospective litigation against those of providing injured parties with remedies and allocating accountability of tortfeasors. In addition to the "outer perimeter" test of *Barr*,²¹ the Court recognized a discretionary function requirement. Next, the Court rejected a mechanical test for the application of the discretionary function requirement, and placed the burden for establishing entitlement to immunity squarely on the party seeking to invoke its protection. The posture of the case,²² however, prevented any precise definitions of the boundaries of official immunity or the level of discretion necessary to obtain absolute immunity. The Court recommended that Congress establish standards governing the area. Finally, the Court held that future cases must balance

the competing factors to ensure the proper extension of the protections of immunity.

The purpose of official immunity is to insulate the decision-making process from the harassment of prospective litigation.²³ The underlying assumption is that federal officials who fear litigation and personal liability will be unduly timid in the execution of their duties.²⁴ The most eloquent statement of this principle appears in the opinion of Judge Learned Hand in *Gregoire v. Biddle*:

[T]o submit all officials, the innocent as well as the guilty, to the burden of trial and to the inevitable danger of its outcome would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties . . . [I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.²⁵

However meritorious the protections afforded by absolute official immunity, the injured party is denied recovery on an otherwise valid claim simply because his tortfeasor is a federal official, and the federal official avoids judicial accountability for misconduct. In striking a balance between these competing concerns, the Supreme Court held that absolute immunity is justified only when the benefits of immunity outweigh the "perhaps recurring harm to individuals."²⁶

It is intuitively obvious that effective government and fearless performance of duties by officials would be enhanced only when immunity attaches to acts within the scope of the official's duties. This concept is best interpreted broadly, so as to encompass the implicit as well as explicit responsibilities of office.²⁷ Logic also dictates that the most apparent socially negative effect of potential liability will be in areas where a decision must be made and where that liability is not a desired element of the decision matrix.²⁸ The premise of the Supreme Court's resolution of the conflict over the need for a discretionary function requirement is that potential liability only has an effect on conduct that is

¹³ *Id.* at 582.

¹⁴ *Erwin v. Westfall*, 785 F.2d 1551, 1552 (11th Cir. 1987).

¹⁵ *Johns v. Pettibone Corp.*, 769 F.2d 724, 728 (11th Cir. 1985).

¹⁶ *Erwin v. Westfall*, 785 F.2d at 1552-53.

¹⁷ *Westfall v. Erwin*, 107 S. Ct. 1346 (1987).

¹⁸ The precise holding of the Court was that "absolute immunity does not shield official functions from state-law tort liability unless the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature." *Westfall v. Erwin*, 108 S. Ct. 580, 585 (1988).

¹⁹ *Barr v. Matteo*, 360 U.S. 564 (1959).

²⁰ *Doe v. McMillan*, 412 U.S. 306 (1973).

²¹ *Barr*, 360 U.S. at 575.

²² *Westfall*, 108 S. Ct. at 585; see also *supra* text accompanying note 16.

²³ *Westfall*, 108 S. Ct. at 583. See generally *Suing Government*, *supra* note 4; *Suing Our Servants*, *supra* note 4 (offering empirical justifications for immunity based upon the calculus of official decision making). Cf. *Woolhandler*, *supra* note 4 at 400-06 (suggesting that liability for executive acts serves a parallel purpose to requirements of judicial process for judicial behavior).

²⁴ *Westfall*, 108 S. Ct. at 583.

²⁵ *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.), *cert. denied*, 339 U.S. 949 (1950) (quoted at length in *Barr v. Matteo*, 360 U.S. 564, 51-72 (1959)).

²⁶ *Westfall*, 108 S. Ct. 583 (quoting *Doe v. McMillan*, 412 U.S. 306, 320 (1973)).

²⁷ See *Barr v. Matteo*, 360 U.S. at 575.

²⁸ In fact, whether or not officials are empowered to make choices, they can respond to fear or threat of litigation and liability through delay, inaction, building records, or substituting riskless behavior wherever possible. See *Suing Our Servants*, *supra* note 4 at 305-15. Logically, that society would benefit by "free-market government" where, as in general tort law, liability served to conform conduct to social norms. Such effects, however, would only be noticed at a level of decision making where immunity would clearly attach to an official's choices.

a product of judgment or discretion, and that some tortious, in-scope conduct will involve neither.²⁹

As an alternative to the argument that there should be no discretionary function element, defendants-petitioners argued that immunity should attach as long as there was present "minimal discretion." Under this model, petitioners suggested that if the precise conduct were not mandated by law, courts should regard the act as discretionary. The Court reasoned that because virtually all official acts involve some choice, this approach would render the discretionary function requirement meaningless, and, more importantly, ignore the balance of benefits against costs essential to ensuring that immunity attach only where its purposes were served.³⁰ Conduct not entitled to absolute immunity, then, is that "involv[ing] the exercise of a modicum of choice and yet . . . largely unaffected by the prospect of tort liability, making the provision of absolute immunity unnecessary and unwise."³¹

As a part of a judicial doctrine, *Westfall* represents the essential third leg of a trilogy of absolute official immunity cases. Until or unless Congress acts to establish standards of its own,³² case law will have to build upon what could now be termed the *Barr*, *Doe*, and *Westfall*³³ doctrine. For this reason, a brief review of the decisions in *Barr* and *Doe* is appropriate.

The *Barr* decision allowed absolute immunity based upon an explicit finding that the defendant had acted within the outer scope of his official duties as a government employee.³⁴ Defendant *Barr* was sued in tort for an alleged defamation resulting from the issuance of a press release concerning the imminent suspension of the plaintiffs, his subordinates.³⁵ The Court recognized that executive official immunity could not serve its basic purposes if it was limited only to cabinet-rank officials. The scope of immunity is determined not only by the function of the government official, but also by the nature of the acts involved. Of course, the facts of the individual case would be determinative and senior officials would receive immunity more often than lower ranking employees.³⁶ The *Barr* Court did not specifically require that the conduct complained of must be discretionary. The *Westfall* Court, though, construes *Barr* as turning on the discretionary nature of the defendant's acts.

In *Doe*, the Court applied *Barr* to a case where two of the defendants, federal officials, were acting within the outer perimeters of their duties, but did not appear to exercise any discretion in performing the act allegedly causing the plaintiff's injuries.³⁷ Plaintiffs sued a number of legislators, federal employees, and District of Columbia officials for invasion of privacy resulting from the publication and dissemination of a congressional report. All the defendants except the Public Printer and Superintendent of Documents received immunity. As to those officials, though the Court found them to be acting within the scope of their duties, it also found that they exercised no discretion with regard to the offending report. The Court remanded the case to determine other issues.³⁸ First, the Court explained that *Barr* did not establish a fixed, mechanical rule for immunity, but rather recognized the guiding principles that must be weighed in each case. Under *Doe*, the defendant must act within the outer perimeter of his duties, but the inquiry must continue. The official must also demonstrate that the function which gave rise to the allegedly tortious acts embodied a legitimate and desired exercise of discretion. Like the *Barr* case, however, the *Doe* decision did not explicitly require discretion as an element. Again, the *Westfall* Court found that discretion in the particular function giving rise to the lawsuit was crucial to the result.³⁹

As a result of this incomplete model for decision, the conflict among the circuits arose. On one hand, some courts adopted the view that the *Barr* decision required a discretionary function element.⁴⁰ In opposition were cases holding that the test lay in defining the outer limits of the official's duties, though admitting that the discretionary nature of the act complained of would affect the definition of those limits.⁴¹ Moreover, some courts saw *Barr* as applying only to defamation suits,⁴² while some cited it as controlling in all state-law actions.⁴³

The decision in *Westfall* is consistent with *Barr* and *Doe* in recognizing the essential conflict between the protection of the individual citizen against tortious injury, and the protection of the public interest through immunity for government agents.⁴⁴ The balancing of these factors is the consistent methodology for resolution of the three cases. The *Westfall* decision puts to rest any suggestion that *Barr* and *Doe* are to be confined to the governmental speech area.⁴⁵ The *Westfall* decision also connects the *Barr* and

²⁹ *Westfall*, 108 S. Ct. at 583-84.

³⁰ *Id.* at 584-85.

³¹ *Id.*

³² See *infra* text accompanying notes 66-75.

³³ *Barr v. Matteo*, 360 U.S. 564 (1959); *Doe v. McMillan*, 412 U.S. 306 (1973); *Westfall v. Erwin*, 108 S. Ct. 580 (1988).

³⁴ *Barr*, 360 U.S. at 575.

³⁵ *Id.* at 568.

³⁶ *Id.* at 573.

³⁷ *Doe v. McMillan*, 412 U.S. 306, 322-23 (1973).

³⁸ *Id.* at 307-10, 324-25.

³⁹ *Id.* at 322-23.

⁴⁰ See, e.g., *Johns v. Pettibone*, 769 F.2d 724, 727 (11th Cir. 1985).

⁴¹ See, e.g., *Poolman v. Nelson*, 802 F.2d 304, 308 (8th Cir. 1986).

⁴² See Comment, *supra* note 4 at 295 n.72.

⁴³ *Id.* at 295 n.73.

⁴⁴ *Barr v. Matteo*, 360 U.S. 564, 565 (1959).

⁴⁵ See *supra* text accompanying note 13.

Doe cases with an independent discretionary function element and a cost-benefit analysis. If an official establishes that the tort-producing conduct was within the outer perimeter of the scope of duties, and that the conduct was discretionary in nature, it must then be shown that the situation is one where the public benefit of a grant of immunity outweighs the loss occasioned by denying relief to the plaintiff.

Federal officials, or their federal attorneys, can be expected to argue that *Westfall* creates more problems than it resolves. Perhaps the most serious of these is uncertainty in the performance of duties occasioned by inability to define "discretionary." Most officials can easily determine, in advance, when their conduct is within the outer perimeters of their duties. Because virtually all official conduct involves some choice, the lack of certainty about whether acts are discretionary could produce exactly the timidity that absolute immunity was created to prevent. Some of these problems can be addressed and some of the effects of the decision anticipated. Ultimately, the question is how to interpret and apply the decision until, by legislation or through the development of a body of case law, some measure of predictability returns to the area.

Problems with the *Westfall* Decision

An overview of the language of the *Westfall* decision raises a number of serious questions about how it is to be applied by the lower federal courts. Obviously, the most significant problems will be with attempts to define the term "discretionary in nature."⁴⁶ A section of the discussion below is dedicated to that problem. First, however, an examination of other problems is appropriate.

A more subtle, and yet potentially far-reaching issue raised by the *Westfall* decision is whether it had any effect on the *Barr* doctrine other than to clarify the existence of the discretionary function element. The primary question is whether the case modifies *Barr's* reliance on *Gregoire v. Biddle*.⁴⁷

Although the decision states that the purpose of immunity is to protect officials from the harassment of litigation, the Court uses language that suggests that the only way

that effective government could be furthered by immunity is by shielding officials from liability. In the course of three sentences explaining why a discretionary function element is required, the Court refers only to the threat of potential liability.⁴⁸ One of the premises of the *Barr* doctrine was that mere involvement in litigation is sufficiently debilitating to effective government to justify the existence of official immunity.⁴⁹

The Court justifies its decision to impose a discretionary function element as consistent with the functional analysis in *Doe* and other immunity cases.⁵⁰ Functional analysis as a methodology for determining whether absolute immunity is available requires the defendant to leap two hurdles. First, the defendant's position must encompass official duties of a kind that warrants the protection of immunity. Second, the act that gave rise to alleged liability must have been the result of the performance of a protected function.⁵¹ It is with this analysis that the Court limited absolute immunity for Presidential aides in *Harlow v. Fitzgerald*.⁵² Likewise, in *Forrester v. White*, the Court denied absolute immunity from damages under 42 U.S.C. § 1983 to a state court judge, whose decision to fire a court employee was deemed to be administrative as opposed to judicial.⁵³ While there is an attractive symmetry to using the substantially identical two-step analysis of *Westfall* for officials sued for state-law torts, it is in application that the theory breaks down.

Under *Harlow*, a safety net against frivolous suits and the vexation of litigation is created by the objective test for qualified immunity from constitutional torts. Under *Harlow*, officials are shielded from liability only insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.⁵⁴ Likewise, under *Forrester*, judges still enjoy absolute immunity from damages for judicial acts.⁵⁵ In their respective spheres, both tests provide reasonably objective, workable criteria suitable for application at summary judgment.⁵⁶

Unlike qualified immunity for constitutional torts and absolute immunity for judicial acts, the *Westfall* standard does not provide a safety net to protect against frivolous

⁴⁶ *Westfall v. Erwin*, 108 S. Ct. 580, 585 (1988).

⁴⁷ See *Barr*, 360 U.S. at 571-72.

⁴⁸ *Westfall v. Erwin*, 108 S. Ct. 580 (1988).

The central purpose of official immunity, promoting effective government, would not be furthered by shielding an official from state-law tort liability without regard to whether the alleged tortious conduct is discretionary in nature. When an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct. It is only when officials exercise decision-making discretion that potential liability may shackle the fearless, vigorous, and effective administration of policies of government.

Westfall, 108 S. Ct. at 584 (citations omitted) (emphasis added).

⁴⁹ See *Barr*, 360 U.S. at 571. See also *Mitchell v. Forsyth*, 472 U.S. 511, 525-30 (1985) (holding that a district court's denial of a claim of immunity is an appealable "final decision" within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment); *Martin v. D.C. Metropolitan Police*, 812 F.2d 1425, 1430 (D.C. Cir. 1987) (discovery sufficient to contest a motion for summary judgment is one of the burdens that immunity was designed to protect against).

⁵⁰ *Westfall*, 108 S. Ct. at 583 n.3.

⁵¹ *Harlow v. Fitzgerald*, 457 U.S. 800, 812-13 (1981).

⁵² *Id.*

⁵³ 108 S. Ct. 538 (1988).

⁵⁴ *Harlow*, 457 U.S. at 818.

⁵⁵ *Forrester*, 108 S. Ct. at 543-44.

⁵⁶ In *Harlow*, the Court devoted an extensive portion of the opinion to its explication of the test for qualified immunity and the importance of resolving immunity issues at summary judgment. 457 U.S. at 413-20. While the ultimate holding of the Court was a limitation on the immunity of Presidential aides, the objective test represents a practical approach to the resolution of competing interests conspicuously absent in *Westfall*.

lawsuits, artful pleading, or protracted discovery⁵⁷ to establish facts. The official sued under state-tort law is effectively thrown out with the immunity bath water. The Court makes no effort to establish the kind of objective criteria found in *Harlow* and *Forrester*, and leaves a definition of discretionary function to the lower courts. As the lower courts wrestle with a definition of discretionary function, it is conceivable that the area will become so fact-specific and complex that the legal question of whether immunity is available must await retrospective explication of the facts of the individual case.

A shift in emphasis from prospective to retrospective analysis violates the underlying rationale for immunity. When the defendants argued that immunity should follow a finding of "minimal discretion," an objective analysis based upon whether or not conduct was expressly required by statute or regulation, the Court responded that such a rule would ignore the balancing test and the underlying purposes of the official immunity doctrine.⁵⁸ The *Barr* Court first recognized that immunity protects against the harassment of litigation, allowing federal officials to expect that they will not be sued for their official acts, and thereby enhancing efficient decision making.⁵⁹ Liability should also be viewed prospectively, with an emphasis on its deterrent effect upon conduct by officials. The *Westfall* decision will undoubtedly deter nondiscretionary actors. Due to the lack of clearly articulated standards, the decision can also be expected to deter discretionary actors who don't know how to define their conduct. The lower courts are left with the enormous task of creating a test that is clear and capable of application at summary judgment.

One district court recently indicated that analysis of the immunity defense requires no more than examination of plaintiff's allegations.⁶⁰ The Tenth Circuit, in a pre-*Westfall* decision, has stated that immunity is an issue that can be decided as a matter of law at summary judgment.⁶¹ The threat of protracted litigation and resulting interference with government could become significant absent commitment to disposition of cases at the earliest stage.

The Court made it clear that the government official has the burden of proving entitlement to immunity.⁶² The question is how the official is expected to prove entitlement to immunity at summary judgment. Minimal discretion is insufficient.⁶³ Beyond that, officials and agency attorneys must await development of the definition of discretionary. Meanwhile, officials remain uncertain of whether they will be liable for the consequences of performing their assigned duties.

Another potentially troublesome phrase in the precise holding of *Westfall* is the reference to testing whether the

"challenged" conduct of the official is within the outer perimeter of an official's duties and is discretionary in nature.⁶⁴ The question is whether such a term would allow the plaintiff to control the existence of immunity merely through a calculated focus on an insufficiently discretionary act. Sufficiently fine slicing could separate every allegedly tortious act from an official function. Alternatively, the plaintiff would only have to identify some employee or official in the casual chain who could not meet the discretionary function requirement. In the multilayered bureaucracy characteristic of the federal government, it is likely that such a person always exists. These possibilities suggest two additional problems potentially resulting from the *Westfall* decision. First, defendants can fairly be expected to advocate "derivative" immunity for non-discretionary acts performed at the behest of superior officials performing discretionary functions. Derivative immunity was rejected by the Court in *Harlow* as inconsistent with the functional approach to immunity.⁶⁵ Where officials may operate under objective guidance and criteria concerning immunity, this rationale is sound. The undefinable nature of the discretionary function element in a state-law tort context may justify a revisiting of the derivative immunity concept in order to ensure that government is not unduly impinged by threats of protracted litigation and potential liability. Further, it would not be inconsistent with a functional analysis approach to view a particular discretionary function as extending vertically through several levels of responsibility, thus protecting both policy makers and policy implementers.

Second, *Westfall* may encourage plaintiffs to focus their allegations on "ministerial" acts and actors. The decision may subvert a stated goal of the functional approach, providing recovery to injured parties, by directing law suits against officials who may well be judgment-proof due to their lower status in the bureaucracy. The courts could resolve these dilemmas through a careful analysis of the true nature and cause of the injury alleged, a broad interpretation of official "functions," and by refusing to be bound merely by the allegations of the complaint.

As part of the resolution of immunity issues, the Court requires a balancing of elements, and immunity is possible only where the benefits to effective government outweigh potential harm to plaintiffs. The overall posture of the balancing test required by the Court is unclear. The question is whether the test constitutes a separate third prong of the official immunity decision matrix, or whether it is inherent in examining for a discretionary function. Curiously, in some cases before *Westfall*, the need to balance benefits against costs was adopted as a "necessity test" and as a justification

⁵⁷ Insubstantial lawsuits should not be allowed to proceed to trial, as they undermine the effectiveness of government as contemplated by our constitutional structure. Firm application of the Federal Rules of Civil Procedure is fully warranted in such cases. *Harlow*, 457 U.S. at 819 n.35 (citing *Butz v. Economou*, 438 U.S. 478, 507-08 (1978)).

⁵⁸ *Westfall v. Erwin*, 108 S. Ct. 580, 584-85 (1988).

⁵⁹ *Barr v. Matteo*, 360 U.S. 564, 571 (1959).

⁶⁰ *Owens v. Turnage*, 681 F. Supp. 1095, 1097 n.3 (D.N.J. 1988).

⁶¹ See *Chavez v. Singer*, 698 F.2d 420, 421 (10th Cir. 1983).

⁶² *Westfall*, 108 S. Ct. at 585.

⁶³ *Id.* at 584-85; see also text accompanying note 29.

⁶⁴ *Id.*

⁶⁵ *Harlow v. Fitzgerald*, 457 U.S. 800, 810-11 (1981).

for not applying a discretionary function test.⁶⁶ The opinion in *Westfall*, however, appears to conclude that the balancing test is a guiding principle best implemented by the discretionary function and outer-perimeter tests. In light of the difficulty inherent in a judicial approach to the social question of balancing public benefits against individual harms, the balancing test perhaps best remains an underlying consideration, used to validate the results of the two-prong test of scope and discretion.

The Court's holding requires that the challenged conduct be discretionary in nature. Aside from the creation of a "floor" level of discretion at some point more than "not specifically required by statute or regulation," the Court provides no definition of the requirement other than reference to the underlying balancing of competing interests.⁶⁷ The issue is of paramount importance to government employees because potential exposure to suit guides many acts of choice that rest in the broad gray area between acts that are purely ministerial and those that are totally discretionary in nature.⁶⁸ Unfortunately, courts have wrestled with the problem in the past and have been unable to develop a workable definition.

The problems associated with developing a definition from the *Westfall* opinion begin with deciding the operational phrase, whether it is "discretionary," "discretionary in nature," or "conduct [that] is discretionary in nature."⁶⁹ This dilemma is more than semantic because the courts ultimately will decide whether the particular act must be the product of discretion, or merely the product of generally discretionary conduct. Other questions in need of answers include whether inaction is conduct, and whether there can be non-conduct of a discretionary nature. One troubling indication of where the Court may be heading in this area appears in *Berkovitz v. United States*,⁷⁰ a case involving the discretionary function exception to the FTCA. The plaintiff, who contracted polio after ingesting an oral polio vaccine, alleged that the Department of Biologic Standards, then a part of the National Institute of Health, negligently failed to follow its own mandatory regulations in approving the manufacture and distribution of the vaccine. The Court held that the discretionary function exception to the FTCA⁷¹ did not protect the United States from liability

when federal employees deviate from mandatory procedures.⁷² In discussing whether an employee is exercising discretion in implementing a regulatory procedure, the Court, citing *Westfall*, said "if the employee's conduct cannot appropriately be the product of judgement or choice, then there is no discretion in the conduct for the discretionary function exception to protect."⁷³ While on its face this may seem to be a rather straightforward approach to the problem, upon analysis, the implications for the federal employee are serious. Assume that the employees charged with certifying the safety and efficacy of the vaccine followed the regulations to the letter, but the regulatory scheme itself was deficient, and an unsafe vaccine was produced. The injured plaintiff would be barred from suing the United States because the discretionary function exception to the FTCA retains sovereign immunity for claims "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid. . . ."⁷⁴ The individual employee may not be so fortunate. *Westfall* requires discretionary activity before immunity is appropriate and *Berkovitz* says that a federal employee following regulations is not exercising discretion. Thus, in the hypothetical mentioned above, the United States escapes liability while the employee following the mandatory regulations is not entitled to immunity because no discretionary conduct is involved.⁷⁵

Obviously, no simple answer exists to the dilemma posed above. Because the issue is so value-laden, perhaps one simple answer cannot and should not exist. Nonetheless, the courts have attempted a definition; some of their efforts may be revealing.

The FTCA does not waive sovereign immunity for torts resulting from acts performed in the course of a discretionary function.⁷⁶ Some have suggested that the case law and standards developed under the FTCA should apply to absolute immunity. While a few courts have adopted the FTCA standard for official immunity,⁷⁷ the better reasoned opinions have rejected a wholesale merger on the basis of underlying policy.⁷⁸ The courts that have argued that official immunity doctrine and FTCA discretionary function

⁶⁶ See *Garner v. Rathburn*, 346 F.2d 55, 57 (10th Cir. 1965); *Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d 655 (2d Cir.), cert. denied, 374 U.S. 827 (1962).

⁶⁷ *Westfall*, 108 S. Ct. at 585; see *supra* text accompanying note 16.

⁶⁸ See *Suing Government*, *supra* note 4, at 68-81 ("[T]here are strong reasons to regard official self-protection as a significant and growing problem."). See also Cass, *Damage Suits Against Public Officers*, 129 U. Pa. L. Rev. 1110 (1981) (concluding that individual response to liability, while not empirically verifiable, would likely be some kind of "shirking" action, and that enterprise liability is a better mechanism for securing appropriate official behavior); Shepsle, *Official Errors and Official Liability*, 42 Law & Contemp. Probs. 35 (1978) (suggesting, in the context of a decisional model, that civil liability of officials may have effects on decision-making more closely correlated to the types of errors inherent in particular decision processes as opposed to characteristics of governmental functions).

⁶⁹ The current edition of *Words and Phrases* contains nearly 50 pages of citations defining terms spanning from "discretion" through "discretionary power." *Words and Phrases*, "Discretion" (1954 & Supp. 1987).

⁷⁰ 108 S. Ct. 1954 (1988).

⁷¹ 28 U.S.C. § 2680(a) (1982).

⁷² 108 S. Ct. at 1959 (1988).

⁷³ *Id.*

⁷⁴ 28 U.S.C. § 2680(a) (1982).

⁷⁵ See *supra* note 65 and accompanying text for a discussion of the concept of "derivative" immunity and how it may protect the individual.

⁷⁶ 28 U.S.C. § 2680(a) (1982) (FTCA does not apply to any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused").

⁷⁷ See, e.g., *Jackson v. Kelly*, 557 F.2d 735, 737-38 (10th Cir. 1977).

⁷⁸ See *Sami v. United States*, 617 F.2d 755, 770-73 (D.C. Cir. 1979); *Estate of Burks v. Ross*, 438 F.2d 230, 234 (6th Cir. 1971).

exception are quite different and should be treated so, maintain that the FTCA is designed to provide a remedy through a broad waiver of sovereign immunity, and that exceptions to that waiver be interpreted narrowly in order to give greatest effect to the intent of the FTCA. Absolute immunity is designed to effectuate good government while recognizing that some valid claims must go unremedied.⁷⁹ A crucial difference in focus is mandated under the FTCA, which is concerned first with providing the broadest removal of barriers to recovery, and the absolute immunity area of the law, which is designed to promote government by removing even the fear of suit and liability. Additionally, while the discretionary function exception of the FTCA has been limited to policy decisions at high levels, recent cases have suggested a broader reach.⁸⁰ The functional analysis approach, when adapted to the FTCA body of law, tends to expand the coverage of the discretionary function exception by embracing more than just top level policy makers. On the contrary, in the absolute immunity area, functional analysis seems to narrow the range of protected functions performed by lower level officials. The Supreme Court's decision in *United States v. VARIG Airlines* is an excellent example.⁸¹ In that case, the Court reversed a lower court decision that had held the FTCA's discretionary function exception applicable only to policy-making discretion. In extending the application of the discretionary function exception, the Court noted that it is "the nature of the conduct, rather than the status of the actor, that governs."⁸² The predictability offered as an advantage to aligning the two definitions may be illusory as well as inconsistent with policy. Without legislation to deal with the difficulties of the discretionary function test, courts will have to rely on the opinions of the courts of appeals that applied the test and presaged the *Westfall* decision.

The circuits that applied a discretionary function test agreed somewhat about a correct analysis. Not surprisingly, the cases reflect an awareness of the underlying policy conflict between officials and the individual, and reflect a functional analysis. The Tenth Circuit identified a range of functions that progressed from ministerial acts, through discretionary acts not entitled to immunity, to clearly discretionary acts at a planning or policy level. The conduct of the official was analyzed and a label applied. Only clearly discretionary conduct is entitled to immunity. This methodology is consistent with the circuit's interpretation of

commonality between the FTCA and official immunity definitions of discretionary functions, and limits immunity primarily to highly placed officials,⁸³ but unduly narrows the availability of absolute immunity for others.

The Fifth Circuit used a necessity test that focused not on the conduct of the official, but on the need to free the official from fear or threat of suit and liability.⁸⁴ This was also the original Tenth Circuit rule.⁸⁵ Because the necessity test does not also address the potential harm to individual plaintiffs in a balancing test, the *Westfall* decision would seem to overrule this approach.⁸⁶

In some circuits, "discretionary" is defined simply as "not ministerial."⁸⁷ Where those courts would grant immunity for what the *Westfall* Court termed minimally discretionary acts, the view may no longer represent good law.⁸⁸ A better view is that ministerial acts encompass not only conduct mandated by law or regulation, but some other lower level execution of duties as well. Somewhere between the Tenth Circuit's unduly narrow approach and the now partially invalid definitions of other courts lies the proper scope of the absolute immunity defense. It would be folly, though, to presume that *Westfall's* progeny in the lower courts will be uniform. At best, officials must hope that courts will recognize a few guiding principles.

Two recent cases from the Eleventh Circuit demonstrate the inconsistency that is likely to result as courts apply *Westfall's* discretionary function element. In *Scott v. DeMenna*,⁸⁹ the court found discretion in a Department of Agriculture employee's decision to report a police raid on a farm. The official's job description included a duty to report "unusual occurrences" that might affect farm prices in a newsletter published by the Department. Because the official's job description did not codify a definition of unusual occurrences, the court found the selection of reported topics to be a discretionary function and reversed the denial of defendant's motion for summary judgment.⁹⁰ This result resembles the minimal discretion position advanced by defendants in *Westfall*.

In *Johns v. Pettibone Corp.*,⁹¹ the court held that a contract decision to delegate provision of safety measures at a TVA construction project to an independent contractor was an exercise of discretion entitled to immunity under *Westfall*. The court adhered to the Eleventh Circuit rule

⁷⁹ See *Barr v. Matteo*, 360 U.S. 564 (1959).

⁸⁰ See *Johns v. Pettibone Corp.*, 843 F.2d 464 (11th Cir. 1988) (holding that in Eleventh Circuit, where discretionary function is interpreted identically in both FTCA and official immunity areas, government employees exercised discretion in delegating provision of safety measures to independent contractor). See also *United States v. VARIG Airlines*, 467 U.S. 797 (1984).

⁸¹ *United States v. VARIG Airlines*, 467 U.S. 797 (1984).

⁸² *Id.* at 813. Cf. *Berkovitz v. United States*, 108 S. Ct. 1954 (1988) (rejecting per se discretionary function status for all regulatory functions in favor of the functional analysis approach).

⁸³ See *Nietert v. Overby*, 816 F.2d 1464, 1467 (10th Cir. 1987); *Jackson v. Kelly*, 557 F.2d 735, 737-38 (10th Cir. 1977).

⁸⁴ See *Williamson v. United States Dep't Agric.*, 815 F.2d 368, 378-80 (5th Cir. 1987).

⁸⁵ See *Garner v. Rathburn*, 346 F.2d 55, 57 (10th Cir. 1965).

⁸⁶ This is especially so in light of the way some courts used the necessity test to justify not applying a discretionary function test. See *supra* note 55 and accompanying text.

⁸⁷ See *Johnson v. Alldredge*, 488 F.2d 820, 824 (3d Cir. 1973), *cert. denied*, 419 U.S. 882 (1974); *Estate of Burks v. Ross*, 438 F.2d 230, 235 (6th Cir. 1971); *David v. Cohen*, 407 F.2d 1268, 1271 (D.C. Cir. 1969).

⁸⁸ See *supra* note 29 and accompanying text.

⁸⁹ 840 F.2d 8 (11th Cir. 1988).

⁹⁰ *Scott v. DeMenna*, 840 F.2d at 9.

⁹¹ 843 F.2d 464 (11th Cir. 1988).

that the conditions under which absolute immunity is available are congruent with those justifying application of the discretionary function exception in FTCA actions,⁹² but emphasized that determination of discretionary acts was not based on rigid distinction between planning and operational decisions.⁹³ Yet, the same authority cited for the FTCA/official immunity congruence rule has been cited by the Eleventh Circuit as establishing that the proper test is one based on a planning versus operational analysis.⁹⁴

These cases demonstrate that even where courts purport to have established discretionary function definitions and analytical methodologies, uncertainty will result in official immunity cases. Likewise, courts that did not previously apply a discretionary function test cannot simply adopt existing methodologies.

However discretion is defined, the most common denominator is that a discretionary act involves the exercise of judgment. In fact, the variety of resolutions in the cases is made uniform through this concept.⁹⁵ Merely stating that discretion involves the exercise of judgment, like broad theoretical definitions advanced,⁹⁶ is of little benefit to the low or middle level official who, absent practical guidance, may be less than fearless in the execution of duties due to threatened liability. Likewise, describing conduct as planning or operational, ministerial or discretionary, provides little guidance because all employees plan their activities to some extent and exercise some discretion in the performance of their duties.

If any distinction between these terms exists, it is a matter of degree.⁹⁷ Perhaps the greatest difficulty lies not in denying recovery to injured plaintiffs, but in assessing liability against the lower level official who only tries to follow orders while those who make the decisions go free.⁹⁸ As long as the best judicial remedy is only to deny recovery, or impose liability upon those who merely execute the orders of decision makers, no precise definition should be given. Until Congress acts to remedy the situation as only that body can, the scope of immunity must remain subject to imprecise variables associated with social values. As one court stated:

[O]bjective standards are notably lacking when the question is not negligence but social wisdom, not due care but political practicality, not reasonableness but

economic expediency. Tort law simply furnishes an inadequate crucible for testing the merits of social, political, or economic decisions.⁹⁹

The shading that courts give to acts at the cusp between ministerial and discretionary or mandatory and judgmental may, in the end, be a function of the desirability of the conduct involved. So even in the Tenth Circuit, where the rule is stated as limiting immunity to acts involving "judgment, planning, or policy" (a relatively narrow concept derived from the FTCA's discretionary function exception), the term "judgment" was expanded to immunize a clerk's decision to report alleged misconduct of a supervisor.¹⁰⁰ While this may seem as unprincipled as defining all conduct not specifically required by law as at least "minimally discretionary," such reasoning demonstrates that the desirability of the employee's conduct must be the touchstone, not the rigid categorization of behavior.

Legislative Response to *Westfall*

The Court in *Westfall* recognized the difficulties inherent in judicial attempts to define the scope of absolute immunity. Congress is best suited to gather the empirical data necessary and to assign weight to the relevant components of the decision process. Because of Congress' broad powers, it alone has the capability to immunize the official, provide recovery to the injured party, allocate the cost of immunity to the sector of society that benefits by it most, and prescribe provisions to ensure the existence of some kind of deterrence against repeated misconduct.

Congress is no stranger to statutory immunity, and in the past fifteen years has enacted several measures revealing its ability to assess and address the considerations mentioned above.¹⁰¹ For example, when Congress determined that the impact of litigation would undermine the ability of the military to provide quality health care, Congress enacted the Gonzales Act.¹⁰² Under that act, military doctors are immunized from malpractice suits, the United States is substituted as defendant, and actions must be prosecuted under FTCA procedures. Similar statutes exist immunizing Department of Defense attorneys¹⁰³ and government drivers.¹⁰⁴

Congress can appropriately tailor its responses to particular needs and degrees of need. For example, in the face of

⁹² *Id.* at 467 n.2.

⁹³ *Id.* at 466.

⁹⁴ *Andrews v. Benson*, 809 F.2d 1537, 1542 (11th Cir. 1987) (citing *Franks v. Bolden*, 774 F.2d 1552 (11th Cir. 1985)).

⁹⁵ See, e.g., *Nietert v. Overby*, 816 F.2d 1464, 1467 (10th Cir. 1987) (even narrow view of Tenth Circuit rule expanded where low level conduct involves judgment).

⁹⁶ "Jurisdiction" may be defined as the right to exercise government power over a defined class of persons or things in defined situations. "Authority" may be defined as the scope of governmental power that can be exercised over the persons or things over which the official has jurisdiction. "Discretion" could be defined as the right to decide whether jurisdiction exists and to determine the limit of authority.

Comment, *supra* note 4 at 290.

⁹⁷ See *Westfall v. Erwin*, 108 S. Ct. 580, 584 (1988); *Suing Our Servants*, *supra* note 4 at 303-04; Prosser, *Handbook of the Law of Torts* 990 (4th Ed. 1971).

⁹⁸ Prosser, *supra* note 97 at 990.

⁹⁹ *Blessing v. United States*, 447 F. Supp. 1160, 1170 (E.D. Pa. 1978).

¹⁰⁰ See *Nietert v. Overby*, 816 F.2d 1464 (10th Cir. 1987).

¹⁰¹ See *supra* note 6.

¹⁰² 10 U.S.C. § 1089 (1982). See *Bass v. Parsons*, 577 F. Supp. 944, 948 (S.D.W. Va. 1984).

¹⁰³ 10 U.S.C. § 1054 (1982).

¹⁰⁴ 28 U.S.C. § 2679 (1982).

the *Bivens* decision,¹⁰⁵ Congress liberalized the FTCA by allowing suit for the most numerous of the *Bivens*-type suits. The amendment broadened the FTCA waiver of sovereign immunity and allowed suits against the United States for certain intentional torts committed by federal law enforcement officers.¹⁰⁶ Although some saw the amendment as only a small first step in providing remedies for constitutional abuses,¹⁰⁷ Congress has not seen fit to expand the scope of the remedy.

A legislative response to the *Westfall* decision should satisfy certain criteria. First, officials should be protected not only from potential liability, but also from the harassment of litigation. The complexity inherent in attempting to define a discretionary function indicates that, especially for the lower level employee, the issue might not be capable of resolution by summary judgment.¹⁰⁸ Second, the cost of public official's misfeasance, if not borne by the official, must be placed on the element of society that profits most by the protection of officials. Because the general public is said to reap the benefit of the good government resulting from fearless execution of duties by officials, the public should bear the cost of immunity. Third, to satisfy expectations of fairness, the forum should be judicial, and the mechanism a lawsuit. Fourth, judicially-created immunities must play no part in the action. Fifth, otherwise valid principles of federal tort law, such as the *Feres* doctrine,¹⁰⁹ must be preserved. Finally, officials, no longer facing liability, must be deterred from negligent conduct through some system of accountability and discipline.¹¹⁰

A legislative remedy must, therefore, be responsive and predictable. It must be responsive to the competing interests inherent in a correct resolution of the immunity question. It must be predictable to guide or unencumber official conduct. Legislative changes like those proposed by former Attorney General Bell in 1979¹¹¹ generally serve these criteria.

Legislation should be in the form of amendments to the FTCA. Federal employees should receive immunity from suits alleging torts under state-law arising from acts performed within the employee's scope of duties. Second, the statute must substitute the United States as defendant in the action. Third, the action should be governed by the provisions of the FTCA. Fourth, the statute should not permit the United States to raise common law or judicially created official immunity as a defense, but it should allow the United States to raise defense otherwise valid under the FTCA.

Finally, Congress should enact provisions allowing for administrative hearings ultimately empowered to discipline officials. Plaintiffs who have obtained money judgments should be empowered to initiate administrative process. While some legitimate government functions may entail injuries to individuals, building an administrative record of

review should encourage agencies to explore alternative courses of conduct. By allowing successful plaintiffs to initiate such process, the public may be confident that agencies do not blindly incorporate tortious conduct into standard operating procedures. Agencies should adopt some administrative procedure to receive such reports, investigate them, and ultimately impose necessary discipline. Additionally, disciplinary procedures should be sufficiently flexible to identify responsible officials even where actions are brought against the United States in the first instance. For example, the Army's litigation regulation requires reports to the Department of Army concerning all lawsuits against the Army or Army officials.¹¹² Such a centralized information-gathering system could be easily adapted to identify responsible parties. Errant officials should not escape responsibility merely because the United States was the named defendant. Further, Congress should make some provision for monetary recovery from former employees. This is not to suggest that administrative sanctions should be applied in every instance. Rather, such a system would allow agencies to identify, using their specialized knowledge of their functions, where injury-producing conduct warrants individual sanction. At the same time, such sanctions would be independent of any judicial remedy to injured plaintiffs.

This proposal addresses the key concerns that a legislative response to *Westfall* must contain. Although it could be argued that legislation is inappropriate until or unless the federal courts adopt an oppressive standard for the discretionary-function element, waiting for the development of judicial doctrine can be exasperating. Defendant *Barr* was a named defendant during six years of litigation before the Supreme Court's final opinion.¹¹³ The resulting *Barr* doctrine was not finally clarified by *Westfall* for another twenty-eight years.

Conclusion

The decision in *Westfall* represents another attempt to fashion a legislative remedy in a judicial furnace. The results, though well-reasoned and well-founded, are not adaptable to their purpose. The Court itself recognizes its limited ability to respond to the needs of federal officials to remain free from the threat of litigation and liability, and at the same time, to the injured individual's need for compensation. The problem is made more complex by the recognition, but not definition, of a class of officials who exercise sufficient power to inflict injury, but insufficient discretion and authority to avoid the consequences of their tortious conduct. Because these individuals can be expected to in turn name their supervisors as defendants, thereby creating a conflict of interest within the agency, they may

¹⁰⁵ *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

¹⁰⁶ 28 U.S.C. § 2680(h) (1982).

¹⁰⁷ See Bell, *Proposed Amendments to the Federal Torts Claims Act*, 16 Harv. J. on Legis. 1, 5 n.19 (1979).

¹⁰⁸ See *supra* text accompanying notes 44-48.

¹⁰⁹ *Feres v. United States*, 340 U.S. 135 (1950) (barring claims by servicemen arising out of or in the course of activity incident to service).

¹¹⁰ See *Suing Our Servants*, *supra* note 4 at 361-67; Bell, *supra* note 107 at 12-15, 16.

¹¹¹ See *supra* note 107.

¹¹² Army Reg. 27-40, Legal Services: Litigation, para. 2-3 (4 Dec. 1985).

¹¹³ See *Suing Government*, *supra* note 4 at 40-41.

face the difficulty of litigation and liability alone.¹¹⁴ Even if discretion is ultimately defined very broadly, one of the principles of tort liability is to allow individuals to conform their behavior to social standards of care, and more importantly, to predict the results of their conduct. To require public servants to operate in the interim with no definable standards for potential liability is a burden they should not have to bear simply because they chose government employment.

¹¹⁴ See generally *id.* at 82-89; 28 C.F.R. § 50.16(a).

Editor's Note—At the time this article went to print, House Bill 4612 (*Federal Employees Liability Reform and Tort Compensation Act*) had passed the House of Representatives and the Senate. The bill amends Title 28, United States Code, and provides for an exclusive remedy against the United States for suits based upon certain negligent or wrongful acts or omissions of U.S. employees committed within the scope of their employment.

The New AR 15-6

Captain D. Ben Tesdahl*

Student, 37th Judge Advocate Officer Graduate Course

Army Regulation (AR) 15-6 (Procedure for Investigating Officers and Boards of Officers) has been completely revised and published with an effective date of 11 June 1988.¹ The revised regulation is the result of nearly three years of work by the Administrative Law Division, Office of The Judge Advocate General.² During that time, the draft regulation was revised several times to incorporate comments from field Staff Judge Advocates and Army civilian lawyers prior to final approval by The Judge Advocate General.

AR 15-6 is used extensively by Army lawyers and non-lawyers alike for the conduct of a variety of fact-finding investigations, often resulting in administrative or punitive sanctions against soldiers and Army civilian employees. Consequently, it is imperative that all Army lawyers be familiar with the new changes to AR 15-6. Because the structure of the revised text has been so extensively reorganized, however, no attempt was made within the regulation to highlight changes from the earlier version of the regulation dated 24 August 1977.³ The purpose of this article is to assist Army lawyers by detailing the most significant changes to the regulation. Whenever possible, the reason for the change and its anticipated impact will also be discussed. For ease of comparison, changes will be discussed by chapter, as the basic chapter structure has remained unaltered.

Chapter 1—Introduction

Several subtle changes and deletions were made within Chapter 1 to clarify the use of formal and informal fact-finding procedures and to stress the point that formal procedures should be the exception rather than the rule. For example, AR 15-6 now states that, although the "[d]esirability of providing a comprehensive hearing for persons whose conduct or performance of duty is being inquired into" is one of many factors that a commander should consider when deciding whether to use formal or informal procedures,⁴ the existence of this factor *does not require* formal procedures.⁵ The regulation also emphasizes that unless formal procedures are required by other regulations or directed by higher authority, "all cases . . . will use informal procedures,"⁶ and AR 15-6 itself never mandates the use of formal procedures, even if the investigation is inquiring into the conduct or performance of a particular individual.⁷

Chapter 1 also has two new provisions designed to ensure compliance with related regulations and directives regarding general officers, Senior Executive Service civilians, and

*This article was written when the author was Chief of Administrative Law, 9th Infantry Division (Motorized), Fort Lewis, Washington. The author wishes to acknowledge the invaluable advice and editing assistance of LTC Joseph R. Barnes, Staff Judge Advocate, 9th ID (MTZ), who worked extensively on the revision to AR 15-6 when formerly assigned to the Administrative Law Division, Office of The Judge Advocate General (OTJAG).

¹ Army Reg. 15-6, Boards, Commissions, and Committees: Procedure for Investigating Officers and Boards of Officers (11 May 1988) [hereinafter AR 15-6]. All citations below are to the 1988 revision, unless otherwise specifically noted.

² The proponent agency of AR 15-6 is the Office of The Judge Advocate General, HQDA (DAJA-AL), WASH DC 20310-2212.

³ Army Reg. 15-6, Boards, Commissions, and Committees: Procedure for Investigating Officers and Boards of Officers, (24 Aug. 1977) [hereinafter AR 15-6 (1977)].

⁴ See AR 15-6, para. 1-4b(1) and para. 1-4b(1)(e).

⁵ Previously, AR 15-6, para. 1-2b (1977), stated that "[t]he desirability of providing a comprehensive hearing for persons whose conduct or performance of duty is being inquired into should also be considered . . . since only formal procedures are designed to do that." (Emphasis added). The above wording was often misinterpreted as requiring a formal board whenever the investigation focused on the conduct or duty performance of a given individual. The language of the new revision was designed to minimize this erroneous interpretation. The rule itself, i.e., that this is an important factor but not in itself determinative as to whether informal or formal procedures are used, has not changed.

⁶ AR 15-6, para. 1-4b(3).

⁷ *Id.* para. 1-4b(2).

civilian employees. First, a cross-reference to AR 20-1⁸ was added to ensure compliance with that regulation's requirement to refer allegations concerning general officers or Senior Executive Service civilians to The Inspector General for a determination on how to proceed.⁹ Second, AR 15-6 has a new provision reminding military authorities that the Federal Personnel Manual controls adverse actions against civilian employees and establishes the required procedural safeguards.¹⁰ Furthermore, in every case involving contemplated formal disciplinary action against civilian employees, "the servicing civilian personnel office and labor counselor will be consulted before the employee is notified of the contemplated adverse action."¹¹

The rules on use of results of investigations have also been clarified and simplified. The new text stresses that unless required by other regulations, an investigation under AR 15-6 is not required before taking adverse administrative action against an individual.¹² Furthermore, if an investigation was conducted, it may be used for any purpose, "whether or not that individual was designated a respondent, and whether formal or informal procedures were used."¹³ As before, there is no requirement to refer an investigation to an individual if a contemplated adverse action is prescribed in regulations or directives that already provide procedural safeguards, such as notice and an opportunity to respond.¹⁴ If no such safeguards are mandated by other regulations, however, military authorities desiring to take final adverse administrative action against an individual based on information obtained "as a result of an investigation or board"¹⁵ must give the individual, as a minimum: (1) notice of the proposed adverse action, (2) a copy (if not previously provided)¹⁷ of that part of the findings and recommendations and supporting evidence on which the proposed action is based, and (3) a reasonable

opportunity to reply in writing.¹⁸ The person's response must also be reviewed and evaluated prior to taking final action.¹⁹ One common situation where the above provision would be used is a relief for cause action based on an investigation under AR 15-6, because the relief for cause regulation itself provides no procedural safeguards.²⁰

Chapter 2—Responsibilities of the Appointing Authority

Chapter 2 was changed to increase the number of persons who can appoint formal and informal investigations or boards. The previous version of AR 15-6 allowed formal boards to be appointed only by general or special court-martial convening authorities, by a principal staff officer of a major Army commander, or by Headquarters, Department of the Army.²¹ The new version now allows formal boards to be appointed by any general or special court-martial convening authority "including those who exercise that authority for administrative purposes only," any general officer, any commander or principal staff officer in the grade of colonel or above at the installation, activity, or unit level, and any State adjutant general.²² Because the use of formal boards is still fairly infrequent,²³ the increase in the number of potential appointing authorities is not likely to increase the number of such boards.

With respect to informal boards and investigations, AR 15-6 had previously provided that they could be appointed by any officer authorized to appoint a formal board, by a commander at any level, or by a principal staff officer of a general court-martial convening authority.²⁴ The new version expands the last category above to include any "principal staff officer or supervisor in the grade of major or above."²⁵ Whether this expansion will have any real effect

⁸ The regulation now states: "Before opening an investigation involving allegations against general officers or Senior Executive Service civilians, the requirements of AR 20-1, para. 5-3d, must be met." *Id.* para. 1-4b(5).

⁹ Army Reg. 20-1, Inspector General Activities and Procedures, para. 5-3d (16 Sept. 1986).

¹⁰ AR 15-6, para. 1-8b.

¹¹ *Id.*

¹² *Id.* para. 1-8a.

¹³ *Id.* The limitations of para. 1-8b regarding civilian employees and para. 1-8c regarding minimum procedural safeguards do apply. See *supra* note 10 and *infra* notes 15 and 17-19.

¹⁴ *Id.* para. 1-8d.

¹⁵ *Id.* para. 1-8c. The phrase "as a result of an investigation or board" was used instead of "obtained in an investigation or board," which had previously appeared in AR 15-6, para. 1-4b (1977). This subtle change emphasizes that the procedural safeguards of notice and an opportunity to comment are restricted to those situations where the AR 15-6 investigation produces the evidence on which adverse action is contemplated, as opposed to situations where preexisting and previously known evidence (e.g. a Military Police report) is incorporated in an AR 15-6 investigation.

¹⁶ AR 15-6, para. 1-8e has been added and states, "When the investigation or board is conducted pursuant to this regulation but the contemplated administrative action is prescribed by a different regulation or directive with more stringent procedural safeguard than those in c above, the more stringent safeguards must be observed."

¹⁷ The phrase "if not previously provided" was added to make it abundantly clear that a second copy of the AR 15-6 investigation need not be provided to an individual when notified of the proposed adverse action. See *id.* para. 1-8c(1). AR 15-6, para. 1-4b (1977) use to contain the following provision: "[W]here a copy of . . . the investigation or board, and the supporting evidence, on which the adverse action is based, has not been otherwise provided to the individual, such materials will be provided upon the request of the individual." (Emphasis added). This provision has been deleted from the 1988 version of AR 15-6 and a specific request by the soldier for a copy of the investigation is no longer required.

¹⁸ AR 15-6, para. 1-8c(1)-(2). The term "reasonable opportunity" is not defined, but appointing authorities would be well advised to give soldiers at least 72 hours (3 duty days) to respond and submit matters.

¹⁹ *Id.* para. 1-8c(3).

²⁰ Army Reg. 600-20, Army Command Policy and Procedures, para. 2-15 (30 Mar. 1988).

²¹ AR 15-6, para. 2-1a (1977).

²² AR 15-6, para. 2-2a(1)(a)-(d).

²³ See *supra* notes 4-7.

²⁴ AR 15-6, para. 2-1a (1977).

²⁵ AR 15-6, para. 2-1a(2)(c).

on the number of informal investigations and boards initiated under AR 15-6 remains to be seen. Because informal investigations can now be appointed by any field grade principal staff officer or supervisor at any level without consulting the servicing judge advocate,²⁶ there is certainly an increased possibility of multiple investigations being initiated by different appointing authorities for the same purpose and without each other's knowledge.²⁷ On the other hand, one benefit of giving field grade principal staff officers and supervisors the authority to appoint informal investigations is that minor incidents or personnel problems not warranting the attention of higher level commanders or staff officers can be properly investigated and resolved at appropriate levels.

An additional expansion has occurred in the area of who can act as investigating officers (IO's) or voting board members. In addition to commissioned officers, warrant officers (both commissioned and noncommissioned) may now perform those functions.²⁸

Chapter 2 also clarifies the effect of errors in an investigation or board. AR 15-6 defines and discusses three types of errors: harmless errors, appointing errors, and substantial errors. Except to define "harmless errors,"²⁹ the new version is unchanged from its predecessor in stating that the appointing authority who notes such errors "may still take final action on the investigation."³⁰ AR 15-6 has a new class of errors called "appointing errors," which result when "an investigation is convened or directed by an official without authority to do so."³¹ AR 15-6 now states that

in such cases, the proceedings are a nullity, unless a proper official subsequently ratifies the appointment.³² In the case of "substantial errors,"³³ AR 15-6 still states that the appointing authority may return the case for corrective action if the error can be corrected without substantial prejudice to the individual concerned. There is, however, a new requirement to notify any individual affected by such a return of: (1) the error, (2) the proposed correction, and (3) his or her right to comment on both.³⁴

Related to the section on effect of errors is a new paragraph entitled "Failure to object."³⁵ This section, which only applies to formal boards where there is a respondent, states that "[n]o error is substantial . . . if there is a failure to object or otherwise bring the error to the attention of the legal advisor or the president of the board at the appropriate point in the proceedings."³⁶ Accordingly, substantial errors may now "be treated as harmless if the respondent fails to point them out."³⁷ In formal boards where the respondent does not have a lawyer as his counsel, the above provision could have profound effects on the respondent's later ability to challenge board results. Basically, unless the respondent or his lay counsel are astute enough to detect all errors and object to them during the board, the objection is forever waived.³⁸ There will obviously be some situations in which the above rule will have to be tempered with some common sense and fairness by the appointing authority and his reviewing judge advocate.³⁹

The previous regulation required that investigating officers or voting board members be senior in rank to the

²⁶ An appointing authority is only required to consult with the servicing judge advocate or legal advisor prior to appointing a formal board or investigation. See *id.* para. 2-1a(1).

²⁷ Although there is nothing wrong with having two authorities investigate the same matter, a single investigation or board "should be conducted whenever practicable." *Id.* para. 2-1a(4). In case of doubt or disagreement as to who should appoint the investigation or board, the first common superior of all organizations concerned will resolve the issue. *Id.*

²⁸ *Id.* para. 2-1c(1). Previously, warrant officers could only be voting board members if they were appointed because of their special technical knowledge. See AR 15-6, para. 5-1e (1977). Paragraph 2-1c(1) of the new revision is somewhat ambiguous as to whether warrant officers sitting as voting board members need to be "commissioned" warrant officers. A fair interpretation of the phrase "commissioned or warrant officers" is that they do not need to be commissioned.

²⁹ "Harmless errors are defects in the procedures or proceedings that do not have a material adverse effect on an individual's substantial rights." AR 15-6, para. 2-3c(1).

³⁰ *Id.*

³¹ *Id.* para. 2-3c(2).

³² *Id.*

³³ "Substantial errors are those that have a material adverse effect on an individual's substantial rights. Examples are the failure to meet requirements as to composition of the board or denial of a respondent's right to counsel." *Id.* para. 2-3c(3)(a).

³⁴ *Id.* para. 2-3c(3)(b). If the error was waived by the respondent's failure to raise the error at the appropriate point in the proceeding, however, there probably is no need to inform the respondent of the error and give him an opportunity to comment, since the error would no longer be considered "substantial." See *infra* notes 36-37.

³⁵ This section is not totally new, but is based in part on AR 15-6, para. 5-11 (1977). That paragraph, entitled "Waiver," stated: "Any right conferred by this regulation is conclusively waived by the respondent's failing to exercise it at the appropriate point in the proceedings, unless he has made a request to exercise it and that request has been denied." *Id.* Unfortunately, by its language paragraph 5-11 only applied to "rights" that the respondent "failed to exercise." This language led to many circular arguments about whether a required procedural step was a "right" of the respondent, and if so, whether the waiver applied only to "optional rights" (i.e., those not required unless asserted or "exercised" by the respondent). For example, where evidence was inadmissible under the regulation, was this inadmissibility a "right" of the respondent which he was required to "exercise" by objecting, or was that a procedural requirement applicable even without any action by the respondent? The language of the new revision (see *infra* text accompanying notes 36-37) is both a clarification of and a change to paragraph 5-11, and was designed to cut through the above argument.

³⁶ *Id.* para. 2-3c(4).

³⁷ *Id.*

³⁸ An analogous provision was added to Chapter 3 regarding objections by other voting members to the president's decisions on evidentiary and procedural matters. AR 15-6, para. 3-4 now states: "The legal advisor's decisions are final. Unless a voting member objects to the president's decision on an evidentiary or procedural matter at the time of the decision, it too is final."

³⁹ For example, if the new waiver provision in para. 2-3c(4) was taken at face value, an improperly constituted board of biased individuals could consider privileged testimony at a hearing where the respondent was denied his right to counsel, yet all of the above errors would be considered "harmless" unless the respondent was astute enough to make a timely objection. To avoid such absurd results, judge advocates reviewing formal boards for legal sufficiency should apply the waiver provision of para. 2-3c(4) when the respondent had qualified counsel present during the proceedings to assist him or where, in their judgment, the error in question did not render the proceedings unfair.

person being investigated,⁴⁰ unless the appointing authority determined that it was impracticable because of military exigencies.⁴¹ The new AR 15-6 now notes that the mere "unavailability of senior commissioned officers within the appointing authority's unit . . . would not normally be considered a military exigency."⁴² If an IO is junior to the person being investigated, however, and the appointing authority does not become aware of the problem until the results of the investigation are presented for review and action, the case must be returned for a new or supplemental investigation "only where specific prejudice is found to exist."⁴³ Otherwise, the appointing authority may take final action. Finally, chapter 2 now emphasizes that the appointing authority may take action less favorable than that recommended by the investigation or board, unless another specific directive provides otherwise.⁴⁴ As before, the appointing authority may consider any relevant information in making a decision to take adverse action, to include information not considered at the investigation or board. The drafters of the new revision, however, omitted the previous requirement to advise, in writing, any person who would be adversely affected by the additional information and give them an opportunity to reply and submit relevant material.⁴⁵ This omission is unfortunate, as the right to notice and an opportunity to comment become somewhat meaningless if an individual is not aware of all the evidence being considered by the decision-maker. Judge advocates would be well advised to ensure that, despite the above omission, an affected individual is given, at some time prior to adverse action, notice and an opportunity to comment on the additional information.

Chapter 3—General Guidance for Investigating Officers and Boards

Chapter 3 contains several new provisions regarding the conduct of investigations and boards. The first recognizes the statutory right of the bargaining unit's exclusive representative to be present at an investigation if the board examines an employee. Before the representative has a right to attend, however, the employee must request the representative's attendance, and the employee must reasonably

believe that the inquiry could lead to disciplinary action against him or her.⁴⁶ Previously, AR 15-6 was silent on this point. This new provision, which applies whether the employee is designated as a respondent or not, was added to conform to the language of the civil service statute.⁴⁷ IO's and board recorders should now coordinate investigations involving federal civilian employees with the Civilian Personnel Office and Labor Counselor, particularly in determining the proper role of the exclusive representative at the investigation or board.

The prior version of AR 15-6 was also silent on whether a respondent could record board proceedings. A provision has been added that now allows respondents to record proceedings, but "only with the prior approval of the appointing authority."⁴⁸ In any case, appointing authorities would be well advised to maintain any recordings made by the board recorder or reporter for a reasonable time after final action is taken, in the event a dispute ever arises as to the exact testimony of a particular witness.

The section on rules of evidence and proof of facts has been extensively revised. The previous provisions on real evidence,⁴⁹ documentary evidence,⁵⁰ and testimony or statements of witnesses⁵¹ have been deleted. The new version now simply states that (with a few exceptions discussed below) "anything that in the minds of reasonable persons is relevant and material to an issue may be accepted as evidence,"⁵² including hearsay. The "best evidence" rule⁵³ has also been greatly eroded so that now, any previous statements of a witness may be used, regardless of whether the witness testifies or is unavailable, and regardless of whether the statements were sworn or unsworn, oral or written, or taken during the course of the investigation.⁵⁴ The removal of cumbersome and technical rules of evidence should make AR 15-6 a simple and more useful guide for IO's and board members.

Some limitations on the admissibility of evidence still exist, such as the provisions on communications between lawyer-client and penitent-clergyman.⁵⁵ The husband-wife privilege has been added,⁵⁶ as have new limitations on requiring testimony or evidence from present or former

⁴⁰ AR 15-6, para. 2-1c (1977).

⁴¹ *Id.*

⁴² AR 15-6, para. 2-1c(3).

⁴³ *Id.* para. 2-1c(4).

⁴⁴ Compare AR 15-6, para. 2-3c(3) (1977) with AR 15-6, para. 2-3a.

⁴⁵ AR 15-6, para. 2-3a (1977) stated: "If additional information is to be considered, however, any individual who may be affected adversely by that information will be so advised in writing; he will be given an opportunity to reply in writing and to submit relevant material; and his reply will be considered along with the additional information." This requirement is missing from the new version of AR 15-6.

⁴⁶ See AR 15-6, para. 3-3. The above requirement is based upon 5 U.S.C. § 7114a(2)(B) (1982).

⁴⁷ See *supra* note 46.

⁴⁸ AR 15-6, para. 3-5b.

⁴⁹ AR 15-6, para. 3-6b (1977).

⁵⁰ *Id.* para. 3-6c.

⁵¹ *Id.* para. 3-6d.

⁵² AR 15-6, para. 3-6a.

⁵³ AR 15-6, para. 3-7b (1977).

⁵⁴ See AR 15-6, para. 3-7c(5)(a-f).

⁵⁵ AR 15-6, para. 3-7c(1) (1977) is now contained in AR 15-6, para. 3-6c(1).

⁵⁶ AR 15-6, para. 3-6c(1). The privilege comes from the Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 504 [hereinafter Mil. R. Evid.].

inspector general personnel.⁵⁷ The prohibition against requiring soldiers to sign a statement regarding the origin of any disease or injury they have suffered has also been clarified.⁵⁸

The rules regarding self-incrimination and unlawful searches have had some minor changes made to them. The IO or board is now specifically required to consult with the legal advisor or servicing JA (unless it is impracticable) before ordering a witness to answer a question when they have previously refused to do so based on article 31 or the fifth amendment.⁵⁹ A provision has been added to remind IO's and board members that no adverse inference will be drawn against soldiers who invoke their right to remain silent under article 31.⁶⁰ Also, evidence from a bad faith unlawful search may now be admissible if it can reasonably be determined that "the evidence would inevitably have been discovered."⁶¹ This is analogous to the "inevitable discovery" exception available in criminal proceedings,⁶² and it only makes sense that it should be made available for administrative investigations as well. As for unlawful searches that were not the result of bad faith, AR 15-6 again emphasizes that evidence obtained from such searches is admissible, "even if it has been or would be ruled inadmissible in a criminal proceeding."⁶³

Perhaps the most debated change to AR 15-6 was the rewording of the standard of proof. Although the standard itself has not changed, an attempt was made to clarify and simplify the standard. The previous version of AR 15-6 stated that findings of investigation and boards must be supported by "substantial evidence and by a greater weight of evidence than supports any different conclusion."⁶⁴ The regulation went on to explain that the evidence must establish "a degree of certainty upon which a reasonable person

is convinced of the truth or falseness of a fact, taking into consideration all the facts presented and all reasonable inferences, deductions, and conclusions drawn from them, and considering these elements in their entirety and in relation to each other."⁶⁵ Unfortunately, the term "substantial evidence" was never defined. Furthermore, "substantial evidence" is really an appellate review standard of reasonableness, rather than a standard to be applied at the agency fact-finding level.⁶⁶ Therefore, AR 15-6 has now been changed to state that findings must be supported by "a greater weight of evidence than supports a contrary conclusion, that is, evidence which, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion."⁶⁷ In short, the controversial term "substantial evidence" was totally eliminated. In its place, a simplified definition of preponderance of the evidence was added. The change in wording will probably go unnoticed by the average IO or board member, who usually make findings based on the weight of evidence, coupled with their own common sense. Judge advocates reviewing those findings, however, should be aware of the above language and realize that it is merely an attempt to clarify, but not change, the preponderance standard common to administrative fact-finding proceedings.⁶⁸

Finally, some minor changes have been made regarding actions to be taken after the investigation is complete. The use of DA Form 1574 is no longer required for informal investigations, although its use is still encouraged.⁶⁹ In formal boards, any objections during the proceedings by the respondent or his counsel must now be specifically noted in the report of proceedings.⁷⁰ Finally, if the appointing authority requires further board action, such as taking further

⁵⁷ AR 15-6, para. 3-6c(1) now states: "Present or former inspector general personnel will not be required to testify or provide evidence regarding information they obtained while acting as inspectors general. They will not be required to disclose the contents of inspector general reports of investigations, inspections, inspector general action requests, or other memoranda, except as disclosure has been approved by the appropriate directing authority. . . . (See AR 20-1, para. 1-30.)"

⁵⁸ A soldier never has been "required to sign" a statement regarding the origin, occurrence, or aggravation of a disease or injury that he or she has suffered. See AR 15-6, para. 3-7c(4) (1977) and AR 15-6, para. 3-6c(4). The new revision, however, now clarifies that a "statement made and signed voluntarily by a soldier is not a statement that the soldier was "required to sign." *Id.* This was intended to make the provisions of AR 15-6 coextensive with 10 U.S.C. § 1219 (1982).

⁵⁹ AR 15-6, para. 3-6c(5)(c).

⁶⁰ *Id.* para. 3-6c(5)(d). An interesting question still left unanswered by AR 15-6 is whether any adverse inference can be drawn against a soldier who continues to invoke his right to remain silent, even after being properly ordered to answer questions by the IO or board. Additionally, the drafters of the revision to AR 15-6 should have added to the above paragraph a provision that once the respondent decides to make a statement or testify, he is deemed to have waived any right against self-incrimination. See Mil. R. Evid. 301(e). See also Mil. R. Evid. 301(f)(2).

⁶¹ AR 15-6, para. 3-6c(7). Unfortunately, if no legal advisor is assigned, the "inevitable discovery" determination is left up to the IO or board president. The revision should have required the IO or president to at least consult with the servicing JA before attempting to make such a complex legal decision.

⁶² See *Nix v. Williams*, 104 S. Ct. 2501 (1984).

⁶³ AR 15-6, para. 3-6c(7).

⁶⁴ AR 15-6, para. 3-10b (1977).

⁶⁵ *Id.*

⁶⁶ See generally, B. Schwartz, *Administrative Law* 210 (1976).

⁶⁷ AR 15-6, para. 3-9b.

⁶⁸ The new statement of the standard of proof (see *supra* text accompanying note 67) is remarkably similar to the definition of preponderance of the evidence found in the glossary of the enlisted separation regulation. That regulation defines preponderance of the evidence as "[e]vidence which, after a consideration of all of the evidence presented, points to a certain conclusion as being more credible and probable than any other conclusion. Where the evidence is equally consistent with two or more opposing propositions, it is insufficient." Army Reg. 635-200, Personnel Separations—Enlisted Eliminations, Glossary, (5 July 1984) [hereinafter AR 635-200]. The above similarity was not the result of any conscious effort by the drafters of AR 15-6. Nevertheless, since administrative elimination boards use both AR 15-6 and AR 635-200 as a guide, it should prove helpful and less confusing to board members to have similar definitions in both regulations.

⁶⁹ See AR 15-6, para. 3-13b.

⁷⁰ See *id.* para. 3-15e.

evidence or making further findings, this can now be accomplished by notifying the IO or board president.⁷¹

Chapter 4—Informal Investigations and Boards of Officers

Chapter 4, covering the procedures for informal investigations and boards, is virtually unchanged from the previous version of AR 15-6.

Chapter 5—Formal Boards of Officers

Chapter 5 contains several important changes regarding the conduct of formal boards. Board presidents who determine that they need legal advice are now specifically directed to contact the legal office that ordinarily provides legal advice to the appointing authority.⁷² If a respondent has been designated and the president wants legal advice, "the respondent and counsel will be afforded the opportunity to be present when the legal advice is provided."⁷³ Previously, such an opportunity had only been specifically provided for when a legal advisor who had been appointed to the board was giving advice.⁷⁴ AR 15-6 also specifically defines and limits the "opportunity to be present."⁷⁵ The new definition helps clarify what had been an uncertain area in board proceedings and should eliminate most questions concerning ex parte communications between the board president and his servicing legal office.

The role of the legal advisor to a board has also been clarified. Legal advisors can now be either a judge advocate or "a civilian attorney who is a member of the Judge Advocate Legal Service."⁷⁶ AR 15-6 also clarifies that appointment of a legal advisor "will occur only after consultation with the SJA of the GCM jurisdiction concerned."⁷⁷ The above changes will increase the number of available legal advisors, while at the same time limit the appointment of legal advisors to only those boards where one is absolutely necessary.

One of the most helpful changes to Chapter 5 involves a new provision for the excusal of board members. Previously, voting members could only be excused by the appointing authority.⁷⁸ For many administrative elimination boards,

this meant the General Court-Martial Convening Authority (GCMCA). Obtaining such an excusal could be a time-consuming process, depending on his availability. AR 15-6 now provides that if the appointing authority is a GCMCA or a commanding general with a legal advisor on his or her staff, "the authority to excuse individual members before the first session of the board may be delegated to the SJA or legal advisor."⁷⁹ Although this new provision should prove to be a convenient and time saving measure, SJA's and legal advisors will now have to establish some guidelines for determining which requests for excusal are warranted and which are not. The same guidelines used by SJA's for the excusal of court-martial panel members⁸⁰ might also be adopted for the excusal of board members.

One minor change was made regarding the duties of the recorder. Although recorders are still required to conduct the presentation of evidence and examination of witnesses to bring out all the facts, they are no longer specifically required to do so "in an impartial manner."⁸¹ The previous provision led to situations in which recorders at boards, particularly administrative elimination boards, either concluded that they could not serve as an advocate for the "government's case" or their efforts to do so were thwarted by objections from the respondent's counsel. The new change recognizes and sanctions the inherently adversarial nature of a formal board.⁸²

Despite contrary proposals from the field, the new version of AR 15-6 still retains the provision that, unless specified by the directive under which the board is appointed,⁸³ respondent's "counsel is not required to be a lawyer."⁸⁴ Requiring a lawyer in every case would, among other things, create practical problems of JAGC officer availability in certain situations, (e.g., ROTC disenrollment boards at remote locations). In addition, the previous entitlement to individually requested counsel has been eliminated.⁸⁵ AR 15-6 now provides that "[a] respondent who declines the services of a qualified designated counsel is not entitled to have a different counsel designated."⁸⁶ The same rule applies to federal civilian employees, including those of nonappropriated fund instrumentalities,

⁷¹ See *id.* para. 3-19.

⁷² *Id.* para. 5-1b(2)(b).

⁷³ *Id.*

⁷⁴ See AR 15-6, para. 5-1d(3)(b) (1977).

⁷⁵ AR 15-6, para. 5-1d(1) states that when legal advice is not provided in person, the right to be present is satisfied "by providing the opportunity to listen to or read the advice." There is no right to be present during general advice given before the board initially convenes, to advice provided before a respondent is designated, or to advice provided to the board in order to put their findings and recommendations in the proper form. *Id.*

⁷⁶ *Id.* para. 5-1d(2).

⁷⁷ *Id.* para. 5-1d(3).

⁷⁸ AR 15-6, para. 5-2a (1977).

⁷⁹ AR 15-6, para. 5-2a. AR 15-6 is still silent as to who can excuse the recorder. Because the recorder is appointed by the appointing authority, he can always be excused by the appointing authority. There often needs to be some other person with the power to excuse recorders on short notice or when the appointing authority is not reasonably available. In the 9th Infantry Division (MTZ), a recorder, assistant recorder, and alternate assistant recorder are appointed for administrative elimination boards convened by the division commander. Furthermore, the presidents of these elimination boards are given the authority in their appointment orders to excuse any of the above personnel for good cause. The above procedure is recommended to other units as a convenient and time-saving measure to accomplish excusals of recorders when time or circumstances do not permit the appointing authority to do so.

⁸⁰ See Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 505(c)(1)(B).

⁸¹ See AR 15-6, para. 5-3b (1977).

⁸² See AR 15-6, para. 5-3b.

⁸³ Many regulations do require that respondent's counsel be a lawyer. See, e.g., AR 635-200, para. 2-10 (5 July 1984).

⁸⁴ AR 15-6, para. 5-6d.

⁸⁵ See AR 15-6, para. 5-6b(2) (1977).

⁸⁶ AR 15-6, para. 5-6b(2).

"unless they are entitled to be assisted by an exclusive representative of an appropriate bargaining unit."⁸⁷

Finally, there is no longer any specific provision allowing the respondent to submit a written brief on his own behalf prior to the appointing authority taking action.⁸⁸ The requirement for notice and an opportunity to comment⁸⁹ prior to the appointing authority taking adverse action based on information in an investigation provides the same opportunity.

Samples and Appendices

Except for some rearrangement, the appendices to AR 15-6 are fairly similar to the previous version. Three items warrant mention. First, an appendix detailing required and related publications has been added.⁹⁰ Second, the appendix containing sample appointment orders for investigating officers no longer contains a sample appointment order for an administrative separation board.⁹¹ This particular format was deleted because it was feared that any

administrative separation example would soon become outdated or obsolete when changes are made to AR 635-200. Instead, a sample appointment order for a formal report of survey investigation was added in its place.⁹² Finally, a very useful index has been added to AR 15-6, permitting easier entry into the regulation by referring to topics and subtopics.⁹³

Conclusion

The new AR 15-6 is a significant revision of the former regulation, which had remained relatively unchanged for 11 years. The greatly simplified language and emphasis on informal procedures should make the new AR 15-6 a more effective administrative fact-finding guide for lawyers and non-lawyers alike. Judge advocates who may act as recorders, defense counsel, or legal advisors should thoroughly familiarize themselves with the new changes. Staff Judge Advocates should ensure that appointing authorities are aware of the new provisions.

⁸⁷ *Id.* para. 5-6b(3). In such cases, the assistance of the exclusive representative is obviously required by the agreement.

⁸⁸ See AR 15-6, para. 5-10a (1977).

⁸⁹ See *supra* notes 14-19.

⁹⁰ AR 15-6, App. A.

⁹¹ Such an example used to be contained in AR 15-6, App. A (1977).

⁹² See AR 15-6, Figure 2-1. In the opinion of this author, the use of this new example is unfortunate because it may suggest to commanders that formal investigations under AR 15-6 are desirable in report of survey situations. In reality, nothing could be further from the truth. Evidence from an informal investigation can, and often is, made the basis of a report of survey. See Army Reg. 735-5, Policies and Procedures for Property Accountability, para. 13-2 (14 Jan. 1988). A formal investigation, complete with respondent, defense counsel, recorder, a board of officers, and a summarized transcript of testimony, however, would seldom be necessary or desirable for a report of survey. Thus, the drafters of AR 15-6 may have created more confusion than good by using the above example. In any case, judge advocates should probably discourage formal AR 15-6 investigations in most report of survey cases.

⁹³ AR 15-6, Index.

Practical Considerations of *United States v. Holt*: Use of the Accused's Answers During the Providence Inquiry as Substantive Evidence

Captain James L. Pohl*

Chief, Administrative Law, 8th Infantry Division (Mechanized)

Introduction

In the military justice system, a trial judge may accept a guilty plea only after conducting an extensive discussion (providence inquiry) with the accused concerning the facts and circumstances surrounding the offenses. The judge must be convinced of the accused's guilt before the plea will be accepted. Since 1984, the providence inquiry has been sworn.

Historically, the facts elicited during the providence inquiry were not substantive evidence and could not be used by either side in rebuttal or argument. Recent decisions by the Army Court of Military Review, however, have allowed the facts from the providence inquiry to be used as substantive evidence.

This article will discuss the policy behind the providence inquiry and the practical impact of the recent decisions permitting use of the inquiry as substantive evidence.

North Carolina v. Alford

The United States Supreme Court held that it is constitutional for a trial judge to accept a guilty plea even though the defendant continues to proclaim that he or she is innocent. In *North Carolina v. Alford*,¹ the defendant was charged with first degree murder, which carried a maximum penalty of death. To avoid the death penalty, Alford pled guilty to second degree murder, which carried a maximum penalty of 30 years imprisonment.² After entry of the plea and before it was accepted, Alford testified that he did

*This article was originally submitted in partial satisfaction of the requirements of the 36th Judge Advocate Officer Graduate Course.

¹ 400 U.S. 25 (1970).

² *Id.* at 27.

not commit the crime.³ He said that he was pleading guilty because he was afraid that he might receive the death penalty if convicted on the greater offense,⁴ and because his lawyer advised him to plead guilty.⁵ According to Alford, he was innocent despite the fact that the prosecutor had witnesses who had heard him say, before the crime, that he was going to kill the victim and that, after the murder, he admitted to the killing.⁶ Despite his protestations of innocence, Alford maintained the plea of guilty and was sentenced to the maximum penalty of 30 years in prison.

Alford attacked the validity of his plea on appeal.⁷ He contended that his guilty plea should be set aside because it was induced by his fear of the death penalty.⁸ The Supreme Court rejected Alford's argument, holding that, although guilty pleas must be voluntary and intelligent, the Constitution does not prohibit the acceptance of guilty pleas from defendants who also profess their innocence.⁹ Alford's plea passed constitutional muster because it was a product of his free choice to avoid the possibility of a death penalty.

Military Standard for Acceptance of a Guilty Plea

The Court of Military Appeals has ruled that, although *Alford* may establish the minimum constitutional requirements for an acceptable guilty plea, the military imposes higher standards on its guilty pleas.¹⁰ A military judge may not accept a guilty plea from an accused who will not admit the facts underlying the offenses to which the plea is made.¹¹ To ensure that the accused truly acknowledges this guilt, and that the plea is knowing, the judge must conduct an extensive inquiry of the accused into the factual predicate behind the plea.¹² The military judge has an affirmative duty to clarify any matter, raised by the accused, that is inconsistent with the guilty plea. This duty to clarify extends to any inconsistency, no matter how believable. The Court of Military Appeals has said, "[I]n deciding a providence issue, the sole question is whether appellant made a statement during the trial which was in conflict with his guilty plea. It is unnecessary that his statement be credible; instead, it only need be inconsistent."¹³

³ *Id.* at 28.

⁴ *Id.*

⁵ *Id.* at 29.

⁶ *Id.* at 28.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 39.

¹⁰ *United States v. Epps*, 25 M.J. 319 (C.M.A. 1987).

¹¹ Uniform Code of Military Justice art. 45, 10 U.S.C. § 845 (1982) [hereinafter UCMJ].

¹² Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 910(e) [hereinafter R.C.M.].

¹³ *United States v. Lee*, 16 M.J. 278, 281 (C.M.A. 1983).

¹⁴ 1 M.J. 414 (C.M.A. 1976).

¹⁵ *United States v. Timmons*, 45 C.M.R. 249 (C.M.A. 1976).

¹⁶ *United States v. Brown*, 17 M.J. 987 (A.C.M.R.), *pet. denied*, 19 M.J. 1 (C.M.A. 1984); *United States v. Nellum*, 21 M.J. 700 (A.C.M.R. 1985).

¹⁷ *United States v. Richardson*, 6 M.J. 654 (N.M.C.M.R. 1978), *pet. denied*, 6 M.J. 280 (C.M.A. 1979).

¹⁸ 21 M.J. 571 (A.C.M.R. 1985), *pet. denied*, 22 M.J. 240 (C.M.A. 1986).

¹⁹ *Id.* at 572.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

During the providence inquiry, the military judge must be particularly alert for any defenses raised by the accused. If the accused does raise the possibility of a defense, the judge must ensure not only that the defense is not available, but that the accused agrees that the defense does not apply to the case. In *United States v. Jemmings*,¹⁴ the Court of Military Appeals ruled that when the accused suggests a potential defense during the providence inquiry, the judge must explain the elements of the defense to ensure that it is not available. Also, the judge must discover the accused's attitude towards the possible defense.¹⁵

Use of the Providence Inquiry

The military requirements for guilty pleas have resulted in extensive dialogues between military judges and accused soldiers. The judges must make a sufficient record to withstand appellate scrutiny of the inquiry.

Traditionally, the providence inquiry has been used only to ensure the accuracy of the plea. Trial counsel could not use facts elicited during the inquiry for rebuttal or argument.¹⁶ Also, judges could not consider the facts in sentencing.¹⁷ Two recent decisions of the Army Court of Military Review (ACMR), however, have allowed the use of facts elicited during the providence inquiry as if they were substantive evidence.

In *United States v. Arceneaux*,¹⁸ the accused pled guilty to a one-time drug distribution. During the providence inquiry, Staff Sergeant Arceneaux admitted that he had sold the drugs with the assistance of Private First Class Taylor.¹⁹ He also said that he had been selling drugs for a couple of months before the charged offense.²⁰ During the presentencing hearing, the military judge asked the character witnesses for Arceneaux whether they were aware that he had used a Private to assist him in the offense.²¹ Later, the trial counsel argued that Taylor had been selling drugs for Arceneaux for "some time."²²

In upholding the conviction, the Army Court of Military Review found that the evidence elicited during the providence inquiry was relevant and not unduly prejudicial

under Military Rule of Evidence 403.²³ The court found no abuse of discretion by the trial judge in asking questions based on answers provided in the providence inquiry or permitting the trial counsel to argue those facts.²⁴ The Army Court of Military Review did not address the fact that the "relevant" evidence had been elicited from the accused during the providence inquiry.

In *United States v. Holt*,²⁵ the Army Court of Military Review directly addressed the use of the providence inquiry responses as substantive evidence. Holt pled guilty, *inter alia*, to wrongful distribution of methamphetamine.²⁶ During the providence inquiry, Holt said that Specialist King had told him where to find the drugs.²⁷ Later, the trial counsel elicited testimony from a CID agent that Holt had told him at the time of his apprehension that his roommate, Sergeant Hill, had told him where to find the drugs.²⁸ Trial counsel then highlighted this inconsistency during his argument on sentencing.²⁹ Defense counsel did not object to the prosecutor's argument.³⁰

The Army Court of Military Review noted the line of cases that prohibits use of the providence inquiry as substantive evidence.³¹ In distinguishing those cases, the court emphasized the 1984 Manual for Courts-Martial change that required the accused to be under oath during the inquiry.³² It held that this change permitted use of information arising during the providence inquiry by either side.³³

By allowing either side to use the information, the court created the appearance of fairness. This appearance is illusory. The defense has always been able to present favorable information from the accused through a sworn or unsworn statement. Clearly, *Holt* gives the government additional derogatory information about the accused that was previously unavailable.

Advantages of the Pre-Holt Rules

The limited use of the providence inquiry under the pre-*Holt* decisions had many practical benefits. Most accused soldiers plead guilty pursuant to a pretrial agreement. Both sides benefit from the agreement. Accused soldiers receive a cap on the maximum punishment, and the government receives a quick, clean conviction. Accused soldiers who know that their answers during the providence inquiry will not be used against them can readily admit to uncharged misconduct to protect their "deal." They will not tap dance

with the judge, admitting only the bare minimum facts to get through the plea.

The limited use of the providence inquiry allowed the defense counsel to control the substantive evidence that came out of the accused's mouth. This is consistent with the constitutional right against self-incrimination and fundamental fairness. It is also consistent with the accused's statutory right to choose the method to present testimony to the sentencing authority, i.e., sworn statement, unsworn statement, or statement through counsel.³⁴

The trial counsel is charged with the responsibility to present aggravation evidence to the sentencing authority.³⁵ This duty does not change because the accused pleads guilty. In *United States v. Cowles*, the Court of Military Appeals said:

That appellant elected, by his guilty plea, to relieve the Government of the burden of proving his guilt does not cause a conclusion that he also thereby elected to relieve the Government of its usual burden of producing, "by the independent labor of its officers," its presentencing evidence affecting his punishment.³⁶

Prior to *Holt*, trial counsel would have to generate the government's aggravation evidence. If the accused chose to make a sworn statement, the trial counsel could generate aggravating evidence through artful cross-examination. Under *Holt*, the trial counsel can use the providence inquiry to generate aggravation evidence.

A similar problem raised by the *Holt* decision involves the responsibility of the trial counsel to protect the record.³⁷ Many judges, at the conclusion of the providence inquiry, will ask trial counsel if there are any areas that they wish the judge to explore further. Alert trial counsel can save a defective inquiry by pointing out deficiencies to the trial judge. Most trial judges would rather correct a mistake at this time than be reversed later on appeal. Prior to *Holt*, defense counsel would not question the motives of a trial counsel who asked the judge to inquire further. They would assume that the trial counsel was merely trying to protect the record. After *Holt*, a sharp trial counsel can use this opportunity to generate derogatory information from the accused. Defense counsel will naturally become suspicious that the trial counsel is not merely trying to protect the record.

²³ *Id.*

²⁴ *Id.* at 573.

²⁵ 22 M.J. 553 (A.C.M.R. 1986), *pet. granted*, 23 M.J. 358 (C.M.A. 1987).

²⁶ *Id.* at 554.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 555.

³³ *Id.* at 556.

³⁴ R.C.M. 1001(c)(2).

³⁵ R.C.M. 1001(b)(4).

³⁶ 16 M.J. 467, 468 (C.M.A. 1983) (emphasis in original).

³⁷ R.C.M. 502(d)(5) discussion.

Moreover, the person who most benefited from the limited use of the providence inquiry was the military judge. Prior to *Holt*, he could readily question the accused about all the facts surrounding the offenses without being concerned about entering inadmissible areas. This freedom to explore all facts was particularly important when the accused raised the possibility of a defense. The judge knew that the accused's answers were designed only to ensure the accuracy of the plea and he could therefore go far afield from the charged offenses to achieve what both the defense and prosecution want, a successful guilty plea.

Practical Problems with the Use of the Providence Inquiry as Substantive Evidence

Implementation of the *Holt* decision will create a number of trial practice problems. If the Army Court of Military Review is correct in holding that the accused's providence answers can be used as substantive evidence, then the evidence should be presented to the sentencing entity regardless of whether it is trial by judge alone or before court members. How then is the evidence presented to the members?

One method would be for the trial judge to conduct the providence inquiry and, at its conclusion, recess the proceedings. After the court reporter types up the record, the court could be reconvened with the members. The trial counsel can then read the transcript to the members. Obviously this procedure would greatly delay trials—delays that guilty pleas are designed to avoid.

Another possible method to inform members of the accused's providence inquiry would be to have the members present during the inquiry. Logically, this procedure would be no different than trial by judge alone who, after listening to the inquiry, sentences the accused. Aside from the fact that this procedure is forbidden by statute³⁸ and executive order,³⁹ this solution raises other problems.

First, having the members present during the often time-consuming providence inquiry would take them away from their other military duties. This would defeat one of the principle purposes of a guilty plea, the conservation of government resources.

A second, less serious problem with having the members present during the providence inquiry would occur if the accused did not successfully make it through his plea. The trial would have to be delayed while the government went back to the convening authority to detail new members for the accused's trial.

Sometimes the accused makes a mistake during the providence inquiry. When this happens, the defense usually

requests a recess to discuss the situation with the accused. The accused comes back into court, admits the mistake, and successfully completes the plea. Although trained attorneys realize that the accused's nervousness or fear probably caused the mistake and do not hold it against the accused, it is unlikely that lay court members would appreciate the problem.

The most serious problem with the *Holt* decision is the confusion it creates in the role of the military judge. Under *Holt*, the trial judge conducts the providence inquiry to ensure the accuracy of the accused's guilty plea and to generate substantive evidence for the court. What does the judge do when these two functions conflict? Also, what is the role of counsel in resolving the conflicts?

Prior to *Holt*, the military judge and both counsel had the same narrow objective: to achieve a provident plea. Sentencing concerns were postponed until after the acceptance of the plea. Under *Holt*, the judge loses two allies. The defense counsel will try to minimize the information the accused gives the judge, while the trial counsel will attempt to maximize the information extracted from the accused to use later during sentencing. No matter how the judge conducts the providence inquiry, both sides are likely to object.

For example, in many drug cases an accused will raise the possibility of entrapment. While fully exploring potential defenses, the judge will ask the accused about prior involvement with drugs. The defense counsel should object to prevent the accused from providing uncharged misconduct that could then be used as substantive evidence. To protect the record, the trial counsel must oppose the defense objection. The judge is caught in a dilemma. If the judge does not continue the inquiry, potential defenses will remain unexplored. In the face of the defense objection, does the judge reject the plea and enter a plea of not guilty for the accused? Should the accused lose the benefit of the pretrial agreement because the defense counsel disagrees on the proper scope of the providence inquiry? If the judge does reject the plea, the defense counsel must develop an adequate record to preserve the issue for appeal.⁴⁰

Conclusion

Holt is an unnecessary change to prior practice. The Army Court of Military Review ignored the uniqueness of the military providence inquiry. Instead of clarifying an unclear area, the court created confusion in a previously clear area of the law.

Editor's Note—As this issue went to print, the Court of Military Appeals affirmed the Army Court of Military Review's holding. 27 M.J. 57 (C.M.A. 1988).

³⁸ UCMJ art. 39a.

³⁹ R.C.M. 803.

⁴⁰ Mil. R. Evid. 103.

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

Keeping a Perspective

The final words a soldier convicted and sentenced by court-martial often hears from the military judge are an explanation of his appellate rights, including the right to petition his case to the United States Supreme Court. Soldiers often begin their military appeal with an expectation of "taking it all the way to the Supreme Court." For the vast majority of the cases in the military appellate system, such an expectation is wholly unrealistic. It is hoped that the following information will assist trial defense counsel in appropriately briefing their clients as to what they may expect with regard to taking their case to the United States Supreme Court, and will also assist counsel in creating and preserving an appropriate record in those cases where Supreme Court review may be a realistic possibility.

Cases are eligible for petitions for certiorari only in very specific circumstances. The Military Justice Act of 1983 limits petitions to the following: cases including a death sentence approved by the Army Court of Military Review; cases certified to the Court of Military Appeals by The Judge Advocate General; cases where the Court of Military Appeals has granted a petition for review; and cases where the Court of Military Appeals has granted relief.¹ Furthermore, it may be argued that because military courts are now under the jurisdiction of the Supreme Court, the Supreme Court may issue appropriate writs in aid of its jurisdiction pursuant to the All Writs Act.² Clients should be told that cases which are litigated through the normal course of appellate review will not be ripe for a petition for certiorari for at least a year after their conviction and in most cases much longer.

The rules of the Supreme Court state, "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and

important reasons therefor."³ Unlike the military appellate courts, the Supreme Court makes no provision for the consideration of *pro forma* submissions.⁴ Thus, cases technically eligible for Supreme Court review must present a "certworthy" issue. The Supreme Court Rules list three factors that motivate the Court to exercise its certiorari jurisdiction: (1) conflicts between courts, (2) the need to exercise supervisory power over the courts, and (3) the existence of a federal question.⁵ These factors may not be as persuasive in motivating the review of court-martial convictions as they are in motivating the review of civilian convictions. In *Solorio v. United States*,⁶ the Court indicated its intent to give great deference to the authority of Congress to regulate the armed forces. The Court likened Congress's power to regulate the military to its power to regulate interstate commerce, to coin money, and to declare war.⁷ It is therefore evident that the Court may not treat petitions for certiorari to military courts exactly the same as it treats petitions for certiorari to other federal or state courts.⁸

As of 1 September 1988, there have been just over 100 petitions for certiorari to the Court of Military Appeals filed at the Supreme Court. All but three of these petitions were summarily denied without explanation or comment. In *Mustafa v. United States*,⁹ Justices White and Brennan dissented from the denial of certiorari explaining that the issue raised was a recurring one and that the military evidentiary rule at issue was similar to the federal rule. In *Goodson v. United States*,¹⁰ the Court summarily remanded the case to the Court of Military Appeals for further consideration. The only case to date to receive a grant of review and a full decision was *Solorio*. It can be concluded that a grant of review by the Supreme Court in a military case will be unlikely and the chance for relief even less likely.

¹ Military Justice Act of 1983, Pub. L. No. 98-208, 97 Stat. 1393; 28 U.S.C. § 1259(3) (Supp. IV 1986); 10 U.S.C. § 867(h) (Supp. IV 1986).

² 28 U.S.C. § 1651(a).

³ S.Ct.R. 17.1.

⁴ Unless explicitly waived by the soldier, the Army Court of Military Review has a statutory duty to review all cases for legal and factual sufficiency whether or not appellate defense counsel raise specific issues before the court. Uniform Code of Military Justice art. 66, 10 U.S.C. § 866 (1982) [hereinafter UCMJ]. When a soldier petitions his case to the Court of Military Appeals, appellate defense counsel must submit a supplement to the petition whether or not a substantive issue will be raised on the appellant's behalf. United States Court of Military Appeals Rules of Practice and Procedure, Rule 21.

⁵ S.Ct.R. 17.2; see also Stern, Gressman, and Shapiro, *Supreme Court Practice*, Chapter 4 (6th ed. 1986).

⁶ 107 S. Ct. 2924 (1987).

⁷ *Solorio*, 107 S. Ct. at 2928.

⁸ This is an observation based on actual practice and is quite contrary to the expectations expressed by Congress in granting the Supreme Court jurisdiction over military courts. During Senate hearings, Senator Kennedy explained that the Court would give great deference to the Court of Military Appeals in interpreting the Uniform Code of Military Justice, but with regard to issues of constitutional or federal law, the Court would apply the same standards as it would to any other petition for certiorari. Stern and Gressman, *supra* at 102-03 (quoting 129 Cong.Rec. S16837 daily ed. (Nov. 18, 1983)) (citing H.R. Rep. No. 549, 98th Cong., 1st Sess. 19 (1983) and S.Rep. No. 53, 98th Cong., 1st Sess. 9 (1983)).

⁹ 107 S. Ct. 444 (1986).

¹⁰ 471 U.S. 1063 (1985).

Understanding that the possibility of review by the Supreme Court is remote, defense counsel who believe they are dealing with an issue that may be "certworthy" should nevertheless take appropriate measures to preserve the issue for appeal.¹¹ It is a virtual certainty that a petition involving a factually incomplete record will be denied by the Court. Although preservation of the record may seem elementary, it is often overlooked in the heat of litigating an important constitutional issue, thus limiting appellate review of that issue. It is important for trial defense counsel to realize that, although the trial judge may be aware of all the facts regarding an issue, the appellate courts will only consider what is explicitly stated on the record. In some situations it may be appropriate to request written findings of fact. Furthermore, the record must reflect the importance of the military judge's ruling. The record must demonstrate that the defense exhausted all avenues of relief and its motion to the judge was the final forum available. Finally counsel must clearly articulate the prejudice that will result from the adverse ruling.

Supreme Court review of courts-martial has the potential to provide important relief to convicted soldiers and guidance and direction to military law. It is important, however, that convicted soldiers, and defense counsel for that matter, not harbor any false hopes with regard to the suitability of their case for Supreme Court review. It is equally important that when a "certworthy" issue presents itself, a rare opportunity for Supreme Court review not be lost due to an incomplete record. Captain Scott A. Hancock.

Prior Arrest Evidence by Any Other Name is Just as Inadmissible

In the recent case of *United States v. Delaney*,¹² the Army Court of Military Review ruled that the military judge erred in admitting the accused's juvenile and adult arrests record on sentencing. Record of prior arrests are not relevant in determining an appropriate sentence.¹³ The court found that the military judge abused his discretion in admitting such evidence both as "personal data" contained in a "personnel record" and as rebuttal to the unsworn statement of the accused.

In *Delaney*, the trial counsel introduced a report by the Criminal Investigation Command (CID) of a background investigation of the accused. This report indicated that the accused had a record of juvenile and adult arrests in Bayonne, New Jersey. Photocopies of the Bayonne Police Department's report of his adult arrests were attached to the report.

The military judge initially denied trial counsel's motion to admit the report. Subsequently, over defense objection,

the military judge admitted the accused's enlistment contract which contained the same arrest information as the CID report. The contract was admitted as personal data relating to the character of the accused's prior service. The accused, in an unsworn statement, provided an explanation of the derogatory information contained within his enlistment contract. Trial counsel again tried to offer the CID report and the attached arrest record, this time as rebuttal evidence. The military judge admitted the CID report at this point over defense objection, to rebut the accused's unsworn statement.

The Army court ruled the accused's arrest record "was not admissible for any purpose."¹⁴ Because the Manual for Courts-Martial only provides for the consideration of prior convictions, and not prior arrest records, for sentencing or proof of character, trial counsel cannot be allowed to "bootstrap" such impermissible information to a personnel record.¹⁵

Additionally, the court ruled that the admission of the CID report under the theory that it was appropriate rebuttal to the accused's unsworn statement was also improper. The government, not the accused, raised the issue of the accused's civilian arrests with the erroneous admission of the accused's enlistment contract. The court reasoned that "[t]o subsequently contend that the [accused's] explanation of those arrests raised the issue such as to open the door for proper rebuttal is a fundamental misapplication of the 'open door' doctrine."¹⁶

The *Delaney* case reminds trial defense counsel to stay alert during the sentencing phase of a trial to prevent impermissible derogatory information from being admitted into evidence against the accused. Defense counsel should strive to make timely objections to the admission of prior arrest records, in whatever form. Such vigilance will protect the client from an unnecessarily severe sentence and, in the event of an unfavorable ruling, will preserve the issue for appeal. Captain Alan M. Boyd.

The Error of Efficacy

In *United States v. Thomas*,¹⁷ the Court of Military Appeals announced that the Uniform Code of Military Justice requires a "forged" document be one "which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice."¹⁸ The court, however, declined to define a "legal right or liability." References in the *Thomas* decision to relatively obscure

¹¹ For examples of possible "certworthy" issues, see Hancock, *The Constitution and the Criminally Accused Soldier: Is the Door Opening or Closing?*, *The Army Lawyer*, Nov. 1987 at 28.

¹² ACMR 8800214 (A.C.M.R. 6 Sept. 1988).

¹³ Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(b) [hereinafter R.C.M.].

¹⁴ *Delaney*, slip op. at 4.

¹⁵ *Delaney*, slip op. at 4 (citing R.C.M. 1001(b)(3)). See Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 608 and 609 [hereinafter Mil. R. Evid.]. Compare Fed. R. Crim. P. 32 (c)(2)(C).

¹⁶ *Delaney*, slip op. at 5.

¹⁷ 25 M.J. 396 (C.M.A. 1988).

¹⁸ *Thomas*, 25 M.J. at 397-98 (quoting UCMJ art. 123).

cases that seemed to have holdings contrary to *Thomas* exacerbated the confusion surrounding legal efficacy.¹⁹ Consequently, the Army Court of Military Review has wrestled with this element of forgery.

In *United States v. Becerra*,²⁰ the Army court specifically found that a refund voucher fraudulently signed by the accused was the type of document that would impose a legal liability upon another. The victim, however, was not the party whose name was fraudulently signed. The court held that the legal liability was imposed on the Army and Air Force Exchange Service. The court did not refer to *Thomas* in its decision, but relied upon two earlier decisions.²¹ In *United States v. Grayson*,²² the Army court did rely on *Thomas* in finding that an honorable discharge certificate, a certificate of achievement, and a certificate of participation in a gunnery competition could not be the subject of forgery, because, despite their fraudulent nature, they did not adversely affect the legal liability of another.

In *United States v. Ross*,²³ a pharmacy technician wrote a prescription that was invalid in non-government pharmacies for a drug that was not available in U.S. pharmacies. Although drug prescriptions are proper subjects of forgery, the government conceded at trial that this prescription did not affect a legal right or liability. As defense counsel aptly noted, this prescription was tantamount to a prescription for bananas.

Defense counsel should be particularly wary of government attempts to charge every false writing as a forgery. A fraudulent signature may constitute a number of offenses, but unless it prejudices the rights or liabilities of another, it does not constitute forgery. Captain Harry C. Wallace, Jr.

DICTUM: The Tail That Wags the Dog

The original purpose of the stipulation of fact was simply to set forth those facts that proved the elements of the offense.²⁴ The stipulation of fact, however, has increasingly become a tool for aggravation on presentencing.

Aggressive trial counsel have pushed this area of the law to its limits by putting aggravating facts of questionable admissibility in stipulations of fact. Thus, the accused has been caught between the proverbial rock and a hard place. Sign the stipulation and watch the floodgates on uncharged

misconduct swing open, or refuse to sign and have the government withdraw from a favorable pretrial agreement.

In *United States v. Keith*,²⁵ the Air Force Court of Military Review recommended that trial defense counsel enter into the stipulation of fact when faced with this choice, and raise the issue of inadmissible matters with the trial judge.²⁶ In *Keith*, the stipulation contained misconduct totally unrelated to the offenses and could only be used to show that the accused was a bad person, which is improper.²⁷

This, however, has not always been the position of the Army Court of Military Review. In *United States v. Taylor*,²⁸ the Army Court felt it was an all or nothing proposition. In the Court's opinion, the military judge had improperly inserted himself into the negotiation process by resolving disputed matters contained within the stipulation. The Army court opined that only when the contents of a stipulation of fact rise to the level of "plain error" does the military judge have a *sua sponte* duty to intervene to preserve the fairness of the trial process.²⁹

A split among the Army Court of Military Review panels occurred with the decision in *United States v. Glazier*.³⁰ In *Glazier*, the court held that military judges should make evidentiary rulings concerning motions contesting admissibility of matters presented in the stipulation of fact. After the judge has ruled on the objections or motions, the parties may still agree to be bound by the pretrial agreement or to withdraw from the agreement.³¹ This position is also supported by the Rules for Courts-Martial.³²

In view of the existing conflict, the Court of Military Appeals issued its decision in *Glazier* on 1 August 1988.³³ *United States v. Glazier*, expressly rejects the Army court's position announced in *United States v. Taylor*. The Court of Military Appeals, in a unanimous decision, stated that just because counsel and accused agree that something is true, does not make that fact *per se* admissible.

There are two major differences in the *Glazier* opinions by the Army Court of Military Review and the Court of Military Appeals. In the decision at the Army Court of Military Review the court states that the objection can only be based on R.C.M. 1001 and/or Military Rule of Evidence

¹⁹ *Id.* at 400 (construing *United States v. Driggers*, 45 C.M.R. 147 (C.M.A. 1972) (accused committed forgery by falsely making a permanent-change-of-station order); *United States v. Noel*, 29 C.M.R. 324 (C.M.A. 1960) (increasing the amount on a completed loan application from the Navy Relief Society constituted a forgery); *United States v. Taylor*, 26 C.M.R. 376 (C.M.A. 1958) (forgery was committed by accused who fraudulently signed authorizing official's name to ration books); *United States v. Addye*, 23 C.M.R. 107 (C.M.A. 1957) (fraudulent Request for Partial Payment was a forgery)).

²⁰ ACMR 8701704 (A.C.M.R. 23 June 1988) (unpub.).

²¹ *United States v. Davis*, 31 C.M.R. 162 (C.M.A. 1961); *United States v. Addye*, 23 C.M.R. 107 (C.M.A. 1957).

²² ACMR 8702884 (A.C.M.R. 27 July 1988) (unpub.).

²³ 26 M.J. 933 (A.C.M.R. 1988).

²⁴ See R.C.M. 705b(1), c(1)(B), c(2)(A) and 811.

²⁵ *United States v. Keith*, 17 M.J. 1078 (A.F.C.M.R. 1984).

²⁶ 17 M.J. at 1080.

²⁷ *Id.*

²⁸ *United States v. Taylor*, 21 M.J. 1016 (A.C.M.R. 1986).

²⁹ 21 M.J. at 1018.

³⁰ *United States v. Glazier*, 24 M.J. 550 (A.C.M.R. 1987), *aff'd*, 26 M.J. 268 (C.M.A. 1988).

³¹ 24 M.J. at 553.

³² R.C.M. 811(e) (last sentence).

³³ *United States v. Glazier*, 26 M.J. 268 (C.M.A. 1988).

403,^{34, 35} while the decision by the Court of Military Appeals states the stipulations of fact are subject to all the Military Rules of Evidence.³⁶ The second difference concerns what happens after the defense objection. The Army Court of Military Review leaves it open for either side to withdraw from the pretrial agreement after the military judge rules on the motion.³⁷ Chief Judge Everett states in his concurring opinion, however, that "making such an objection successfully does not violate a pretrial agreement requiring the accused to enter into a particular stipulation of fact and does not entitle the Government to abrogate the pretrial agreement."³⁸

Trial defense counsel must read the Court of Military Appeal's language in *Glazier* closely. The Court of Military Appeals stated that placement of the phrase "agree to the truth of the matters contained herein and that such matters are admissible" into stipulations would act as an affirmative waiver of any objection at trial because the parties have agreed in advance to admissibility. Unfortunately in the day-to-day activities where most trial decisions are made, *Glazier* may be of only momentary assistance to trial defense counsel and their clients. It can be anticipated that trial counsel will soon be requiring the suggested boiler

plate language in all stipulations of fact. If this occurs, then the courts will be faced with the separate issue of whether trial counsel are "overreaching" and seeking an "unfair advantage."³⁹ Perhaps if such a waiver provision becomes the standard, the appellate courts may ultimately strike the phrase under a theory common to the contract principle of adhesion. It is well established that waiving certain rights must clearly be a defense product.⁴⁰ As a practice tip, defense counsel should be prepared to insist that stipulations of fact be limited to the proof of the charged offenses. Trial defense counsel must be careful in their clients' offers to plead guilty and should consider specifically stating that the agreement to enter stipulation of fact is limited by the right to object to matters contained in the stipulation of fact as inadmissible at trial. If disputed matters are included, admissibility should always be challenged by a motion to strike. If trial counsel require language waiving the admissibility issue as a precondition for agreements, then the issue of coercion must be forcefully litigated. After a case has been referred to trial, the trial defense counsel must schedule a 39(a)⁴¹ session as soon as possible if there is a coercion issue as to stipulating to the admissibility. Captain Thomas A. Sieg.

³⁴ Mil R. Evid. 403.

³⁵ *Glazier*, 24 M.J. at 552.

³⁶ *Glazier*, 26 M.J. at 270.

³⁷ 24 M.J. at 553.

³⁸ 26 M.J. at 268.

³⁹ *United States v. Schaffer*, 12 M.J. 425 (C.M.A. 1982); *Glazier*, 24 M.J. at 554.

⁴⁰ *United States v. Schaffer*, 12 M.J. 425 (C.M.A. 1982); *United States v. Jones*, 20 M.J. 853 (A.C.M.R. 1985).

⁴¹ UCMJ art. 39(a).

Government Appellate Division Note

United States v. Gipson: A Leap Forward or Impetus for a Step Backward?

Captain Randy V. Cargill
Government Appellate Division

Introduction

In *United States v. Gipson*,¹ the Court of Military Appeals (COMA) relaxed the *Frye*² test for admissibility of scientific evidence and thereby lifted a longstanding bar to the admissibility of polygraph evidence at courts-martial.³ Commentary to date has centered on a discussion of the

new "helpful and relevant" test, with some treatment of polygraph issues.⁴ This article focuses on the practical consequences of *Gipson* and makes some suggestions for trial counsel faced with polygraph issues at trial. In addition, a recommendation for a change in the Rules for Courts-Martial is presented.

¹ 24 M.J. 246 (C.M.A. 1987).

² *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Frye* requires the proponent of scientific evidence to show that the principles or techniques from which the evidence was derived are "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.* at 1014. Applying that test, the court upheld exclusion of polygraph test results.

³ See, e.g., *United States v. Ledlow*, 29 C.M.R. 475 (C.M.A. 1960); Manual for Courts-Martial, United States, 1969 (Rev. ed.), para 142e.

⁴ See *United States v. Gipson: Out of the Frye Pan, Into the Fire*, The Army Lawyer, Oct. 1987, at 11; Note, *Absolute Bar Against Polygraph Evidence Lifted: Frye Test Superseded*, The Army Lawyer, Sept. 1987, at 36.

Boiler Technician Second Class Gipson was charged with three specifications of possession, transfer, and sale of lysergic acid diethylamide (LSD). The main witnesses against Gipson were two servicemembers who testified that they purchased LSD from Gipson. Prior to trial, at his own expense, Gipson obtained a polygraph examination conducted by a civilian examiner. The examiner concluded that Gipson was telling the truth when he denied committing the offenses. Gipson also took a polygraph examination conducted by a Naval Investigative Service (NIS) agent. The NIS examiner concluded that Gipson was deceptive when he denied committing the offenses. At trial, the defense made a motion *in limine* to admit evidence of the exculpatory examination. The prosecution was willing to stipulate to the civilian polygraph examiner's qualifications but objected to the defense attempt to lay a foundation for the admission of the test result arguing that polygraph evidence is not admissible at courts-martial. Also, trial counsel related that appellant had failed the government administered polygraph test.⁵ The military judge ruled that neither side would be permitted to lay a foundation to admit the polygraph evidence, because polygraph tests were not sufficiently accepted in the "scientific community or the judicial community."⁶ The judge also expressed concern that introduction of polygraph test results would invade the province of the fact-finder.

COMA held that the judge abused his discretion in not allowing the defense an opportunity to lay a foundation for admission of the results of Gipson's polygraph examination. The court addressed each of the military judge's concerns. First, apparently conceding that polygraph results are not "generally accepted in the scientific community" within the meaning of *Frye*,⁷ the court determined that the *Frye* test should be relaxed. Polygraph test results should be evaluated under the court's new "helpful and relevant" test for admissibility.⁸ Second, the court expressed its confidence that panel members would not be overwhelmed by polygraph evidence⁹ and emphasized that the examiner would be permitted to testify that the examinee was truthful or deceptive only in response to the questions asked and only at the time he or she gave the responses.¹⁰ The court expressed no opinion on whether the polygraph evidence in *Gipson* should have been admitted.

Gipson undoubtedly will have a significant impact on courts-martial practice. The decision, representing perhaps the most liberal approach to admissibility of polygraph test results,¹¹ opens the door to efforts to introduce this powerful evidence. While the military judge may be required to caution the members that the test result is only indicative of whether the examinee was being truthful "at the time of the polygraph exam" and may therefore only be used to draw an inference regarding the truthfulness of the witness's in-court testimony, trial counsel should not underestimate the effect of such evidence. The members, many of whom have been encouraged by their legal advisors to rely on polygraph results in making preferral, referral, or nonjudicial punishment decisions, will be inclined to trust polygraph results. The polygraph test result could very often be the tie breaker in close cases. Moreover, many members will probably view the military judge's instruction about inferences and the polygraph results as a distinction without a difference.¹² In any case, it cannot be disputed that the polygraph examiner, an "expert" in the dominant issue in most contested cases (credibility), is a formidable witness. Trial counsel should recognize this and be prepared to both introduce polygraph evidence at trial and respond to defense efforts at introduction. Critical to such preparation is a full understanding of the court's holding and analysis in *Gipson*.

The Problem—Understanding *Gipson*

The key to understanding *Gipson* is to first recognize its narrow holding: the military judge abused his discretion in not permitting the defendant to lay a foundation for the admissibility of his polygraph test result. The court did not rule that polygraph test results are admissible at courts-martial. In fact, the court provided little guidance for military judges to follow in evaluating proffers of polygraph evidence. Its admissibility will depend on "the competence of the examiner, the suitability of the examinee, the nature of the particular testing process employed, and such other factors as may arise"¹³ as balanced against the collateral dangers described in Mil. R. Evid. 403.¹⁴ If that is not sufficiently cryptic, the court goes on to state that even its conclusions about the admissibility of polygraph test results (discussed below) should not be accepted as "immutable

⁵ The facts are taken from Judge Cox's opinion at 24 M.J. 247-48.

⁶ *Id.* at 247.

⁷ Chief Judge Everett hinted that polygraph evidence might even meet the *Frye* test. *Id.* at 255 (Everett, C.J. concurring).

⁸ *Id.* at 251.

⁹ *Id.* at 253 n.11.

¹⁰ *Id.* at 253.

¹¹ Polygraph evidence is *per se* excluded in the Fourth, Fifth, Tenth, Eleventh, and District of Columbia Circuits. *United States v. Brevard*, 739 F.2d 180 (4th Cir. 1974); *United States v. Clark*, 598 F.2d 994 (5th Cir. 1979), *cert. denied*, 449 U.S. 1128 (1981); *United States v. Hunter*, 672 F.2d 815 (10th Cir. 1982); *United States v. Hilton*, 772 F.2d 783, 785 (11th Cir. 1985) (citing *Clark, supra*). *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Unstipulated polygraph evidence is *per se* inadmissible in the Sixth, Eighth, and Ninth Circuits. *Poole v. Perini*, 659 F.2d 730, 735 (6th Cir. 1981), *cert. denied*, 455 U.S. 910 (1982); *United States v. Alexander*, 526 F.2d 161, 163-170 (8th Cir. 1975); *Brown v. Darcy*, 783 F.2d 1389 (9th Cir. 1986). No United States Court of Appeals has affirmed the admission of unstipulated polygraph evidence. Also, no federal circuit court has found that a trial judge abused his discretion in excluding polygraph evidence. *Brown*, 783 F.2d at 1395. Most states exclude all polygraph evidence. At least fifteen states permit polygraph evidence by stipulation of both parties. Only two states (New Mexico and Massachusetts) have upheld the admissibility of polygraph evidence without stipulation. See generally P. Gianelli and E. Imwinkelreid, *Scientific Evidence* 244-256 (1986).

¹² The court expressed its confidence that courts-martial panels will not be overwhelmed by polygraph evidence. See *supra* note 9. Other military courts have reached an opposite conclusion. See, e.g., *United States v. Ledlow*, 29 C.M.R. 475 (C.M.A. 1960); *United States v. Helton*, 10 M.J. 820 (A.F.C.M.R. 1981).

¹³ *Gipson*, 24 M.J. at 253.

¹⁴ Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 403 [hereinafter Mil. R. Evid.].

principles.”¹⁵ These statements, combined with the presence of three separate opinions in *Gipson*,¹⁶ produce a situation where it is almost impossible to predict how the court will react to polygraph issues in the future.

To say the least, that situation is not a bright picture for counsel and military judges. Common sense tells us that the majority in *Gipson* must have had some scenario in mind in which polygraph test results would be admissible. The problem is determining when the court would find it appropriate to admit the test results. Perhaps the court will not “recognize it until it sees it.”

A close examination of the majority opinions in *Gipson* may give some hint of the court’s ideal scenario for admitting polygraph test results and thereby give trial practitioners and military judges some idea of how to evaluate polygraph evidence. In his lead opinion, Judge Cox, while assessing the reliability of polygraph results, makes the following observations. First, he notes that the studies indicate negative polygraph test results (no deception indicated) may be more reliable than positive ones.¹⁷ Second, he notes that *ex parte* examinations may be less reliable, because the ability to discard unfavorable test results eliminates or reduces an essential basis for the reliability of such results—the nervousness created by fear of detection. In this regard, Judge Cox approvingly cites the practice of jurisdictions that accept polygraph test results only where the parties stipulate, before the test, that the result will be admissible.¹⁸ Another indication of Judge Cox’s ideal case for admissibility of polygraph evidence is found in his discussion of the Mil. R. Evid. 403 balancing test that the military judge must conduct in evaluating such evidence. Rejecting the notion that an accused has a due process right to admit exculpatory polygraph evidence, he nonetheless indicates that the 403 balancing test should be slightly skewed for admitting defense polygraph test results.¹⁹ Thus, for Judge Cox, the best case for admitting a polygraph test result (assuming the examiner was qualified and the examinee and issue were testable) would be a defense negative test, conducted under conditions where fear of detection was maximized (ideally where the parties stipulated to its admissibility beforehand). A close second would be a similar test result offered by the prosecution.

In his concurring opinion, Chief Judge Everett seems most concerned about enhancing the reliability of polygraph test results by maximizing fear of detection. He notes that reliability of test results may diminish with later tests (because nervousness about the test may be reduced after one becomes accustomed to taking the test).²⁰ He also expresses his preference for a test conducted where

“representatives of the adverse party had been permitted to observe” the test.²¹ Presumably, therefore, Chief Judge Everett likes the idea of having the parties stipulate to the admissibility of the test result beforehand—the situation where fear of detection is maximized. Thus, Chief Judge Everett’s contribution to Judge Cox’s ideal scenario for introduction of a polygraph test result is that the test be the only one taken by the witness. Both judges agree that an accused cannot introduce a polygraph test result supporting his version of the facts without first testifying.²²

What emerges is some indication of what situation the court would be most likely to sustain the introduction of polygraph test results. The test should be (1) the only one taken by the witness, (2) negative, and (3) given under conditions where fear of detection is maximized (preferably following stipulation as to admissibility by both parties). Additionally, the test result would be relevant only after the witness testifies, and in marginal cases, defense offers of test results should be accorded more favorable consideration. Certainly, there may be other situations where the court will uphold receiving in evidence polygraph test results, but this appears to be the ideal situation and gives trial practitioners and military judges at least some idea how to evaluate the admissibility of polygraph evidence. Or does it?

The problem with the “ideal scenario” is that Judge Cox’s preference for negative results is mutually inconsistent with his and Chief Judge Everett’s desire for a test conducted under circumstances where fear of detection is maximized. Can there be any doubt that an examinee’s knowledge that the test result will only be admissible if it indicates that the examinee is telling the truth diminishes the fear of detection and thereby undermines the basis for validity of his test result? Surely not, and that is the inevitable consequence of a rule admitting only negative results.²³ Thus we are indeed back to where we started—with little idea of when a polygraph test result will be admissible. The most we can say is that because the majority in *Gipson* agreed that maximizing fear of detection was fundamental to the validity of the test result, that ought to be the overriding concern for trial practitioners and military judges.²⁴

Practice Pointers

With this in mind, I offer the following suggestions for trial counsel facing polygraph issues at trial.

First, oppose any defense effort to introduce a polygraph test result unless the examinee knew that the test result was going to be admitted regardless of the outcome. In other

¹⁵ *Gipson*, 24 M.J. at 253.

¹⁶ Judge Sullivan dissented, finding no abuse of discretion where the military judge avoided a battle of experts by not permitting either party to lay a foundation for the polygraph evidence. He also alluded to concerns about the reliability of polygraph test results in general. *Id.* at 255–56 (Sullivan, J. dissenting).

¹⁷ *Id.* at 249.

¹⁸ *Id.*

¹⁹ *Id.* at 252.

²⁰ *Id.* at 255 (Everett, C.J. concurring).

²¹ *Id.* at 255 n.2.

²² *United States v. Abeyta*, 25 M.J. 97 (C.M.A. 1987) *cert. denied*, 108 S. Ct. 752 (1987).

²³ Judge Cox reaffirms what can at least be described as a preliminary preference for negative results when he notes, “[a]rguably, as indicated, there may be a rational basis for distinguishing between positive and negative results.” *Gipson*, 24 M.J. at 252.

²⁴ Of course, counsel should be concerned about the qualifications of the examiner and the suitability of the examinee and issue(s) to reliable polygraph testing.

words, do not concede the admissibility of a test result unless you have stipulated to its admissibility prior to trial and prior to the date of the test. The decision to stipulate will depend on many factors to include, but not limited to, the suitability of the examinee and issue(s) to reliable polygraph testing, the qualifications of the polygraph examiner, and the strength of your case.²⁵ Your opposition to the admissibility of *ex parte* polygraph test results should focus on the unreliability of polygraph test results in general, and *ex parte* tests in particular, as established through cross-examination of the defense expert(s) and your own evidence, such as expert testimony, treatises, and studies.

Second, even if you have stipulated to the admissibility of a test result, oppose its introduction if the witness has not already testified. Your objection should be on the grounds that the result is not relevant until the witness testifies, citing *Abeyta*, and that permitting introduction of the result prior to the witness testifying would constitute improper bolstering of the witness's testimony.²⁶ To avoid a similar defense objection to your introduction of the accused's polygraph test result, include in the stipulation agreement a waiver clause in which the accused waives all objections to the government's introduction of the polygraph test result. Such a waiver is clearly consistent with the goal of maximizing fear of detection (if the accused knows he can veto introduction of his test result by simply not testifying, then surely his fear of detention is reduced). Moreover, *Abeyta* would not seem to prohibit the waiver; an accused's statement, in contrast to other witnesses' statements, can be introduced and attacked regardless of whether the accused testifies.²⁷

Third, avoid surprises and prepare for possible defeat of your opposition to an *ex parte* defense polygraph examination. Reduce the likelihood of surprise by serving a reciprocal discovery request under Rule for Courts-Martial 701(b)(3) and (4)²⁸ for all documents, recordings, charts, or any other evidence that might be generated during a polygraph examination. Upon learning (before or at trial) that the defense may attempt to introduce an *ex parte* polygraph test result, request that the examinee (usually the accused) submit to a government test. If the examinee refuses, make a motion *in limine* to exclude the test result unless the examinee submits to a government test. Judge Cox hinted at the wisdom of such a motion in a footnote to his opinion wherein he cites Mil. R. Evid. 302(d) (allowing the military

judge to exclude defense mental examination evidence where the accused refuses to submit to a government examination) and notes that the court is not faced with a situation where the accused refused to cooperate with the government.²⁹ The manifest rationale of Rule 302(d), to provide the parties equal access to evidence, is equally applicable to polygraph evidence. You should argue that to allow the accused to present an exculpatory polygraph test result without submitting to a government test would be tantamount to shielding a witness from meaningful cross-examination.³⁰ In any case, make every effort to subject the defense polygraph examiner's conclusions to exacting scrutiny. Ask for charts and all other data that led to the defense expert's conclusions. Employ your own expert and make sure that the government expert can listen to the testimony of the defense expert. Require the defense expert to explain his choice of questions, articulate his reasoning process, and justify his conclusions. In short, recognize that polygraph evidence can be very persuasive and treat it accordingly.

With regard to polygraph test results favorable to the prosecution, the decision to seek introduction of such results at trial will turn on all the considerations mentioned above. The only difference is that in marginal cases, prosecution proffers may receive less favorable consideration than defense proffers. Also, the risk of error—overturned conviction on appeal—is much greater where the military judge errs by admitting test results offered by the government. For this reason, I recommend that trial counsel only attempt to introduce polygraph test results in the safest circumstance, i.e., following stipulation by both parties.

Recommendation and Conclusion

Gipson is a troublesome case. The court invites counsel to marshal "the latest developments in support of or in opposition to particular [polygraph] evidence . . . at the trial level"³¹ but provides little guidance for evaluating these developments. The Rules for Courts-Martial are also silent concerning polygraph evidence. The question is what to do about this lack of guidance. We could, of course, do nothing and trust the trial and appellate processes to make the law. That course of action has the beauty of simplicity but perpetuates uncertainty.

The alternatives are to (1) amend the Rules for Courts-Martial to allow polygraph test results as evidence under

²⁵ One federal circuit court has held that a prosecutor's failure to articulate reasons for refusing to stipulate to the admissibility of a test where state law allowed stipulations deprived the defendant of due process. *McMorris v. Israel*, 643 F.2d 458 (7th Cir. 1981), cert. denied, 455 U.S. 967 (1982). Justice Rehnquist, in his dissent to the denial of certiorari, described *McMorris* as establishing a rule requiring a prosecutor to explain his reasons for "refusing to stipulate to the admission of otherwise inadmissible evidence" and cites approvingly cases from two other federal circuits holding that a defendant's constitutional right to a fair trial is not infringed when the prosecutor refuses to stipulate to the admissibility of polygraph test results. *Israel v. McMorris*, 455 U.S. 967, 969, 971 (1982) (Rehnquist, J., dissenting from denial of certiorari). *McMorris* raises some troubling questions. Can a prosecutor refuse to stipulate simply because he does not trust polygraph test results? In other words, can a prosecutor effectively veto the admissibility of test results by ensuring that the test will not be conducted under optimum conditions, i.e., pursuant to stipulation? My advice is to give some reasons based on suitability of the examinee or issue(s) to testing or on the qualifications of the examiner.

²⁶ The court specifically held that polygraph evidence is not character evidence within the meaning of Mil. R. Evid. 608. Nonetheless, the principle behind 608(a)(2) (that a witness' credibility may not be supported until it is attacked) would seem to strongly militate against permitting polygraph evidence (the ultimate credibility evidence) to come in until the witness places his or her credibility in issue.

²⁷ See Mil. R. Evid. 801(d)(2).

²⁸ Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 701(b)(3) and (4).

²⁹ *Gipson*, 24 M.J. at 253 n.12.

³⁰ Cf. *Brown v. United States*, 356 U.S. 148 (1958) (any witness can be held in contempt of court for improperly invoking privilege against self-incrimination in response to cross-examination questions); Mil. R. Evid. 301(f)(2) (Military judge may strike testimony of witness who asserts privilege against self-incrimination in response to non-collateral cross-examination questions.)

³¹ *Gipson*, 24 M.J. at 253.

certain circumstances or (2) amend the Rules to forbid polygraph test results as evidence.³² The only workable amendment allowing polygraph evidence is a stipulation rule allowing the parties to stipulate to the admissibility of a test result prior to the test. The rule should address admissibility of *offers* to take polygraph test results, permissible methods of impeachment of the examiner's testimony, permissible reasons for the government to refuse to stipulate, instructions for the panel members on permissible uses of the evidence, and permissible reasons for withdrawal from the stipulation.³³ And the list, no doubt, will grow as trial and appellate courts wrestle with issues created by allowing "credibility experts" to testify. Perhaps the most fundamental issue of all will be whether the parties *can* stipulate to the admissibility of what may be unreliable evidence.³⁴

³² Judge Cox notes that "[a] few courts have experimented with the notion that an accused has an independent, constitutional right to present favorable polygraph evidence. We do not subscribe to this theory because there can be no right to present evidence . . . unless it is shown to be helpful and relevant." *Id.* at 252. In fact, only two state courts (lower courts) and one federal district court have held that an individual has a constitutional right to present polygraph evidence. See P. Gianelli and E. Imwinkelreid, *supra* note 11, at 257-59. The district court decision was overruled on appeal. *Jackson v. Garrison*, 677 F.2d 371 (4th Cir. 1981), *cert. denied*, 454 U.S. 1036.

³³ See generally P. Gianelli and E. Imwinkelreid, *supra* note 11, at 248-54.

³⁴ See *State v. Dean*, 103 Wis. 2d 228, 307 N.W.2d 628, 646-49 (1981) for an excellent discussion of this issue.

³⁵ *Id.* at 653.

³⁶ *Gipson*, 24 M.J. at 253.

In my view, the benefits of a stipulation rule are outweighed by the costs. The question really boils down to whether military judges and counsel should be the primary participants in the longstanding controversy surrounding the validity of polygraph test results. In 1981, the Supreme Court of Wisconsin ended a seven year experiment with a stipulation rule by noting that the "burden on the trial court to assess the reliability of stipulated polygraph evidence may outweigh any probative value the evidence may have."³⁵ The court barred all polygraph evidence in criminal proceedings.

We should join the majority of state and federal courts and reenact the bar to polygraph evidence. Judge Cox hit the nail on the head when he noted that "the battle over polygraph reliability will continue to rage."³⁶ Let it rage somewhere else.

Trial Defense Service Notes

Ethics in Action: The ARPC Applied

Lieutenant Colonel Michael C. Denny

Regional Defense Counsel, Region III, U.S. Army Trial Defense Service

Although relatively new, the Army Rules for Professional Conduct (ARPC)¹ have already been very helpful in providing guidance to counsel on ethical issues arising out of courts-martial. While they are not intended to answer every ethical question which could arise, the rules serve as a starting point for analysis. They are of particular value to trial defense counsel, and to their supervisors, who have an increased responsibility in resolving ethical issues. At Trial Defense Service (TDS) workshops, counsel regularly discuss situations, ethical issues, and review questions taken from a formal examination covering the ARPC. The diversity of proposed answers from experienced attorneys reveals the difficult ethical issues which can arise. The following is based on an actual case and is an example of how ethical considerations can arise, and how the ARPC assist in their resolution.

The case began as one which gained the attention of a local community from the outset. A Staff Judge Advocate office was almost completely destroyed in a fire. As arson appeared to be the cause, the Criminal Investigation Command (CID) immediately began looking for suspects. Several soldiers had witnessed the fire and not all of them

were upset in the knowledge that the prosecution and other files were in jeopardy of destruction. (The TDS office was located in another building and was spared any damage.) Private First Class Andrew Adverse, who was present at the fire, was questioned by the CID. Exercising his rights, Private Adverse requested legal advice. Captain Carol C. Carroll, a trial defense counsel in the local TDS office, subsequently provided advice to Adverse as a suspect. After a full discussion of the facts with Captain Carroll, Private Adverse elected to speak to the CID and explain his presence at the fire. This explanation satisfied the CID and Adverse was no longer considered a suspect. This did not resolve Adverse's other legal difficulties, however, and subsequently he departed for parts unknown as a recipient of involuntary excess leave.

Several months later, as the investigation moved ahead, Private Bobby Burns was also identified as a suspect in the alleged arson and he was referred to the local TDS office. As luck would have it, the available defense counsel again happened to be Captain Carroll, who did not immediately recall her assistance to Private Adverse several months prior nor anticipate any potential conflict. After conferring

¹ Dep't of Army, Pam 27-26, Legal Services—Rules of Professional Conduct for Lawyers (31 Dec. 1987) [hereinafter ARPC.]

with Burns, it became clear that this soldier's legal problems pertaining to the fire would not be so easily solved. In fact, after the article 32 investigation, it became apparent that the proper course to follow in representing Burns would be to require the government to meet its burden of proof without testimonial help from Burns. In reviewing the possible defenses, it occurred to Captain Carroll that a court might view it grossly unfair for the government to focus on Burns when so many other likely suspects were also at the fire scene. Many of these other soldiers could also have benefited from destruction of prosecution files. At this point, Captain Carroll realized that there might be an ethical consideration. What if it became the best defense tactic to force the government to exclude the other suspects? (This was not a novel suggestion on the part of TDS clients, i.e. that someone else committed the offense.) If this were the appropriate defense, would there not be a conflict with Private Adverse?

Such an analysis led directly to the ARPC. Could presenting such a defense be a breach of duty of loyalty to Private Adverse?² One could reasonably foresee the defense counsel suggesting that the other soldiers present at the fire could have set the fire. Yet for his part, Private Adverse could well take umbrage at being included in a pool of suspects by the same attorney who had advised him on the matter.³ On the other hand, while it is difficult to predict how a specific tactic will play out at trial, the inference against Adverse could turn out to be insignificant and only generally contrary to his interest. The commentary to ARPC Rule 1.9 states, "the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client." Private Adverse's presence at the fire could be considered generally known and it was information not privileged.

In addition to the issue of loyalty to Adverse, would Captain Carroll, in choosing this defense, come close to the prohibition in Rule 3.3 of the ARPC, Candor to the Tribunal?⁴ Captain Carroll, had knowledge that at least one of the group (her former client, Private Adverse) had been cleared by CID, although not by a tribunal. Could Carroll be viewed as misleading the tribunal at Burns's trial? Of course, Captain Carroll might argue, in carefully chosen words that "the government should account for all others

at the scene, excepting of course Andy Adverse, who incidentally was also my client in this matter," but such proposal would not have a ring of solid advocacy.

The impact of either ethical concern, duty of loyalty to Adverse or duty to ensure candor to the tribunal, could cause the counsel to forego the defense when representing Burns.⁵ It is exactly such a reluctance which is the essence of the rule on conflicts. No client should have a counsel who because of conflicting duties is limited in his full vigorous representation.⁶

To Captain Carroll's supervising attorney, the Regional Defense Counsel (RDC) Lieutenant Colonel, the way Carroll's actions would be perceived by former client Adverse was determinative. After several lengthy discussions with Captain Carroll, the RDC made the determination as the supervising attorney in accordance with the ARPC.⁷ He instructed Captain Carroll to inform Private Burns that she could no longer represent him. Captain Carroll naturally greeted this decision with mixed emotion. She had already devoted substantial time and effort to the case, which had become rather complex. Detailing a new counsel would set the defense back weeks. It certainly seemed wasteful to obligate the new counsel to re-interview all the witnesses and begin the investigation anew. After all, what was conflicting was the use of only one possible defense tactic. Captain Carroll wanted to continue in the case, so she asked her RDC to allow her to participate on a limited basis assisting the new counsel. Although this had some logical appeal, the RDC had to balance risking a violation of the ARPC against the new attorney spending time re-investigating the case. The solution of permitting no help appeared to be the most proper as it would preclude any possible issue of what help would be conflicting and what would not be conflicting. Accordingly, the RDC decided that no assistance was to be provided the new counsel.

Instead of clearly resolving the conflict, however, this decision proved to be only an intervening step on the way to trial. Private Burns was not pleased that he had lost the services of Captain Carroll. Although Burns was not displeased with his new counsel, Captain J. C. Latelee, he nevertheless instructed Captain Latelee to take every step ("leave no stone unturned") to have his initial counsel retained. Convinced that it was in his client's best interest,

² "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation." ARPC Rule 1.7a.

³ A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which the person's interests are materially adverse to the interests of the client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

ARPC Rule 1.9.

⁴ "A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; . . . [or] (4) offer evidence that the lawyer knows to be false." ARPC Rule 3.3(a).

⁵ A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

ARPC Rule 1.7(b).

⁶ "Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests." ARPC Rule 1.7.

⁷ "A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to these Rules of Professional Conduct." ARPC Rule 5.1(b).

Captain Latelee worked in that direction. Shortly thereafter, Latelee sought a 39a session with the military judge in an attempt to resolve the issue of counsel under R.C.M. 506(c), MCM, 1984. Did "good cause" exist for the attorney to withdraw?⁸ When the issue was argued, the Military Judge immediately sensed that resolution should first be sought elsewhere. He quickly gave leave to the counsel to seek a reversal of the RDC's instructions. The position taken by the new counsel was that the conflict was waiveable by Burns, after full disclosure, and that the relationship should not be severed. This position was forwarded through the RDC to Chief, Trial Defense Service.

The trial defense counsel's suggestion of waiver had not satisfied the Regional Defense Counsel. Even if the conflict was waiveable by Burns, what about Adverse? Certainly Adverse would not take kindly to his counsel pointing in his direction and suggesting that he might be the real culprit. A waiver by Burns would not resolve the difficulty concerning Adverse. One suggestion considered was to seek a waiver from Adverse, but would it be ethical to ask for such a waiver? In effect, counsel would be saying to Adverse, "Do you mind if I accuse you and others who were present of being the real perpetrators of the arson? Do you mind if I suggest that you and others had more motive to commit the crime?" The commentary to Rule 1.7 of the ARPC suggests that in this case it would not be proper.⁹ A disinterested lawyer could reasonably say that the client should not permit such an inference to be leveled in his direction. Therefore, the RDC did not view it proper for

Captain Carroll to track down Adverse and make the request.

After a review of the facts, the request of the newly detailed counsel was denied by the Trial Defense Service and the issue was returned to the military judge. The military judge found himself in the novel position of ethical arbiter between the Trial Defense Service, the Trial Defense Counsel and two soldiers, one of whom had never been contacted. After ensuring that the accused understood the limitation that was required of counsel and that the accused was intelligently waiving the conflict, the military judge granted Burns's request to have the original counsel stay on the case along with Captain Latelee. Unfortunately, Burns was convicted and it is unlikely he will appreciate the concern which took place on his and his fellow soldiers' behalf.¹⁰

The SJA office has now relocated and the memory of the event was preserved in the celebration of an annual SJA Spring Office Bar-B-Que. Although some might view this process as "much ado about nothing" in view of the end result, it is our concern for these issues which gives us standing as members in the legal profession. The essence of a true profession is that it possesses a code of ethics which it enforces upon itself for the benefit of the society it serves. The Army Rules of Professional Conduct and our concern for them can give us a great deal of pride in our being Army judge advocates.

⁸ "Except as otherwise provided in R.C.M. 505(d)(2) and subsection (b)(3) of this rule, defense counsel may be excused only with express consent of the accused, or by the military judge upon application for withdrawal by the defense counsel for good cause shown." Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 506(c).

⁹ "[W]ith respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement to provide representation on the basis of the client's consent." ARPC Rule 1.7 Comment.

¹⁰ Shortly after this issue was resolved the Supreme Court handed down the decision of *Wheat v. United States*, 108 S. Ct. 1692 (1988). The Court held that the sixth amendment does not give a defendant the right to a counsel who may have a conflict even if all parties are willing to waive any conflict. Chief Justice Rehnquist writing for the majority opined that

the district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.

Had this case been decided earlier perhaps the judge's decision would have been easier although different. In granting the defendant's request, the military judge probably avoided significant appellate issues.

Precluding the "Automatic" Application of the Administrative Reduction Provision of Article 58a, UCMJ in Courts-Martial

Captain Kathy J.M. Peluso

Senior Defense Counsel, Fort McNair Field Office, U.S. Army Trial Defense Service

Most defense counsel appropriately advise their clients that if the court-martial sentence they receive includes a discharge or confinement, they will be administratively reduced to the lowest enlisted grade, despite the fact that the sentence may only include an intermediate grade reduction or no reduction at all. What many defense counsel are not aware of, however, is that there are some ways to prevent that from happening.

Article 58a, Uniform Code of Military Justice, 10 U.S.C. § 858a (1982) [hereinafter UCMJ], provides that if a convening authority approves any portion of a court-martial sentence that includes a dishonorable or bad conduct discharge, any time in confinement, or hard labor without confinement, the enlisted soldier will automatically be reduced to the pay grade of E-1, effective the date of that approval. This automatic reduction is administrative in nature and takes effect independent of any judicially imposed reduction in grade.¹ For example, although a particular enlisted soldier may not be sentenced to a reduction in grade, article 58a, UCMJ will still operate to administratively reduce the soldier to the pay grade of E-1 upon approval of the sentence by the convening authority, if that sentence includes any time in confinement, hard labor without confinement, or a punitive discharge.²

Apparently in recognition of the inflexible nature of the automatic reduction provision, Congress gave the Secretaries of the military departments discretion to limit the application of article 58a, UCMJ, by adding the caveat "[u]nless otherwise prescribed in regulations promulgated by the Secretary of the Department concerned."³ The Departments of the Army, Navy, Air Force and Transportation have each promulgated regulations that, in varying degrees, limit the application of article 58a, UCMJ. The Secretary of the Air Force completely eliminated the application of article 58a, and the corresponding regulation provides that if the court-martial does not impose a sentence that includes reduction, the accused cannot be reduced as part of the court-martial action and, if the court-martial imposes a reduction to an intermediate grade, the accused cannot be reduced below that grade.⁴ Air Force convening authorities have the authority to approve and order into execution (and remit or suspend) reductions

independently of any action they take on the other elements of the sentence, but they may not take action to reduce the soldier to a grade lower than the grade adjudged.⁵ The Secretary of Transportation also did away with automatic reductions in Chapter 4, Section E.1 of the United States Coast Guard Military Justice Manual.⁶ That regulation provides that "[a]utomatic reduction to the lowest enlisted grade under Article 58a, UCMJ, shall not be effected in the Coast Guard."⁷ The Secretary of the Navy prescribed Section 0145a(7) of the Navy JAG Manual, which limits automatic reduction to the lowest pay grade only in a case in which the sentence, as approved by the convening authority, includes (whether or not suspended), either a punitive discharge, or confinement in excess of 90 days or 3 months.⁸ It further provides that the convening authority may, in his or her discretion, remit the automatic reduction, or retain the accused in the pay grade held at the time of sentence or in an intermediate pay grade, and suspend the automatic reduction to pay grade E-1 that would otherwise be effected under article 58a and that section. The automatic reduction may be suspended without regard to whether any part of the approved sentence was suspended. If the Navy court-martial adjudges a sentence that includes a reduction below that which the convening authority desires the accused to serve, the convening authority should suspend the sentenced reduction for the same period as the automatic reduction. Another option of the Navy convening authority is to direct that accused serve in pay grade E-1 while in confinement but be returned to the grade held at the time of sentencing or an intermediate pay grade upon release from confinement.⁹

The Army's regulation is the least limiting on the application of the automatic reduction language of article 58a of the services. Paragraph 6-3d(1) of Army Regulation 600-200 provides that an enlisted soldier will automatically be reduced to the grade of E-1 upon the convening authority's approval of a court-martial sentence that includes a punitive discharge, confinement, or hard labor without confinement. This is, of course, independent of any grade reduction adjudged by the court-martial.¹⁰ Paragraph 6-3d(2), however, does give the convening authority some discretion to control the administrative reduction by

¹ Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1003(b)(5) discussion; *United States v. Koeff*, 36 C.M.R. 424 (C.M.A. 1966); *United States v. Powell*, 30 C.M.R. 288 (C.M.A. 1961); *United States v. Lawrence*, 22 M.J. 846, 847 n.1 (A.C.M.R. 1986); *United States v. Young*, 24 M.J. 626, 628 (A.C.M.R. 1987).

² *Id.*

³ Article 58a, UCMJ; *United States v. Cabral*, 20 M.J. 269, 271-72 (C.M.A. 1985).

⁴ Air Force Reg. 111-1, para. 7-9 (C1 8 July 1986).

⁵ *Id.*

⁶ COMDTINST M5810.1B

⁷ *Id.*

⁸ Department of the Navy, Manual of the Judge Advocate General (JAG Manual), § 0145a(7)(a), Change 6.

⁹ *Id.* at 0145a(7)(b).

¹⁰ See *supra* notes 1 and 2.

"probationally"¹¹ retaining the soldier in the grade held at time of sentence, or in any intermediate grade. To accomplish this, the convening authority must suspend execution of the sentence and provide in the action that the individual will serve in that grade during the period of suspension, and thereafter, unless the suspension is vacated before its termination.¹² The present regulation does not elaborate on what is meant by "suspend execution of sentence." Previous versions of AR 600-200 have essentially the same language, except that they refer to suspension of "execution of above specified elements of the sentence."¹³ It should be assumed that the present regulation is also referring to those portions of the sentence that trigger the application of article 58a (i.e., punitive discharge, confinement, or hard labor without confinement). Therefore, the only way that automatic reduction under article 58a can be limited in the Army is to convince the convening authority to suspend execution of virtually the entire sentence adjudged in a court-martial.

Defense counsel should be aware of the possible use of paragraph 6-3d in negotiating pretrial agreements and submitting post trial clemency petitions. Typically, if a case is referred to a General or BCD Special court-martial, the convening authority wants the soldier to have the opportunity to spend time in confinement and/or receive a punitive discharge. Therefore, if the charges are not already disposed of at a lower level, it may be futile to ask the convening authority to consider suspending the entire sentence in order to limit a reduction in grade.

Although limited, there may be some unique circumstances that lend themselves to the use of paragraph 6-3d(2). It may be appropriate, for example, in the case of a senior NCO with close to (but under) 20 years of service. The command, while insisting that the soldier be subject to reduction of more than one grade, may still be receptive to allowing the soldier to retire at an intermediate pay grade. An article 15 would not be appropriate because an E-7 or above cannot be reduced in grade.¹⁴ A summary court-

martial would not be appropriate because an enlisted soldier in the grade of E-5 or above can only be reduced one pay grade and receive a forfeiture of two-thirds pay for one month.¹⁵ The senior NCO could offer to plead guilty if, in return, the convening authority agrees to suspend any portion of the adjudged and approved sentence that includes confinement, hard labor without confinement, a punitive discharge, or a reduction to a specified intermediate pay grade.

Certain cautions should be noted when negotiating this type of agreement. Remember that if the adjudged sentence includes confinement and there is no petition for deferment of confinement, the client may be shipped off to jail immediately after trial, and before the convening authority takes the required action on the sentence.¹⁶ Any time spent in confinement may jeopardize the pretrial agreement. Additionally, defense counsel may want to negotiate a limitation on the amount of any adjudged fine that the convening authority may approve. Without that, the government may successfully emphasize in its sentencing argument the appropriateness of a very large fine. Recently, a pretrial agreement very similar to the one described above was negotiated with the convening authority in the Military District of Washington with no limitation on the amount of any adjudged fine that could be approved by the convening authority. In that case, the government argued for a fine, and the judge agreed, sentencing the accused to pay a fine of \$10,000. That is a hefty sum of money for a noncommissioned officer already facing a reduction in pay and retirement to come up with on short notice.

Finally, if circumstances warrant, clemency requests could include a suggestion that portions of an adjudged sentence be suspended in order to allow a particular soldier to retire in the grade held at the time of sentencing or an intermediate pay grade. In sum, defense counsel should explore the possible applications of paragraph 6-3d of AR 600-200 during the pretrial and post trial phases of each of their cases.

¹¹ Army Reg. 600-200, para. 6-3d(2).

¹² *Id.* at para. 6-3d(2)(b).

¹³ See Army Reg. 600-200, para. 7-30h(2) (C14 7 Sept. 1971) and para. 7-64(4)(b) (C57, 5 Feb. 1976 and C59, 15 July 1978).

¹⁴ Manual for Courts-Martial, United States, 1984, Part V; Army Reg. 27-10, para. 3-19; Army Reg. 600-200, para. 6-3a.

¹⁵ Manual for Courts-Martial, United States, 1984, Rule for Court-Martial 1301(d)(1) [hereinafter R.C.M.].

¹⁶ R.C.M. 1101(c).

Contract Appeals Division—Trial Note

Hindsight—Litigation That Might Be Avoided

*Major Edward J. Kinberg
Trial Attorney*

This is part of a continuing series of articles discussing ways in which contract litigation may be avoided. The trial attorneys of the Contract Appeals Division will draw on

prior experiences and share their thoughts on avoiding litigation or developing the facts in order to ensure a good litigation posture.

Problem

The post contracting officer has sent you a file involving a delay claim on a post construction project. Upon reviewing the file, you discover that the contractor had already filed a claim arising out of the same incident and that a settlement agreement had been signed by all parties. You had reviewed the initial claim and proposed a release which you believed released all outstanding claims.

The initial claim arose when the contractor was directed to stop work, shortly after the project was started, due to the discovery of a serious design defect. The stop-work order remained in place for 3 months. The contractor submitted a claim for unabsorbed overhead at the end of each month for which work was suspended and a separate cost proposal for increased work due to the design change. This cost proposal was submitted several days after the last claim for unabsorbed overhead. In reviewing the cost proposal in detail, you noted that the contractor specifically excluded certain items from its cost proposal for increased work, but that unabsorbed overhead claims for the three months of delay were not specifically excluded. Based on that fact, you concluded that the first three claims for unabsorbed overhead were included in the cost proposal for the changed work. You advised the contracting officer that the contractor is entitled to an equitable adjustment based on the redesign delay and the changed work, and recommended that the contracting officer attempt to settle all outstanding matters. You also recommended that the contracting officer include the following release in the modification when it is issued;

This modification is a complete settlement of all matters relating to the change in design of this project. The Contractor hereby releases the Government from any and all liability under this contract and for any further adjustments related to the facts or circumstances arising out of the redesign of the building and the proposal for adjustment.

Several weeks later, the bilateral modification, (including the release language you proposed) was executed by the contractor and the contracting officer. Shortly thereafter the contractor sent a letter to the contracting officer asking to begin negotiations on its claims for unabsorbed overhead for the three months of delay. You believe the contractor released that claim when the modification was signed and are inclined to tell the contracting officer to deny the claim.

Solution

Introduction

Based on the facts, as set out above, a careful legal and factual analysis will have to be conducted in order to determine the extent of the release. This entire problem could have been avoided if you had advised the contracting officer to specifically state, in the initial release, that it applied to the contractor's claims for unabsorbed overhead as well as changed work. Whenever a release is drafted, it must clearly and unambiguously state the nature of the claim(s) being released. The release set out above should have stated;

This modification is a complete settlement of all matters relating to the change in design of this project any delays associated with the redesign. The Contractor hereby releases the Government from any and all liability under this contract and for any further adjustments related to the facts or circumstances arising out of the redesign of the building, the proposal for adjustment, and all claims for unabsorbed overhead due to the delay in construction.

If the above release had been in your settlement agreement, you would not have had a second claim from the contractor due to the delay.

Analysis of the Claim

When the Armed Services Board of Contract Appeals reviews a release it will carefully scrutinize the facts and circumstances surrounding the release "to determine the true intent of the parties."¹ While you may be inclined to believe that the release quoted above is sufficient to bar the claim for three months unabsorbed overhead, there is a good chance the Board will not agree with you. In a recent case involving facts similar to those set out above the Board found a release did not bar a contractor's claim for unabsorbed overhead.²

In analyzing the above release you must consider two separate areas. First, you must carefully study the facts leading up to the execution of the release and identify each fact supporting your opinion that the release included the unabsorbed overhead claim. Second, you must ensure that the contracting officer's final decision on the new claim for unabsorbed overhead clearly recites the relevant facts and states that, based on those facts, the contracting officer has concluded that the release covered all claims filed by the Contractor prior to execution of the release.

Facts Leading up to Execution of Release

The Board will first examine the facts leading up to the execution of the release. In so doing, the Board will closely examine the conduct of the parties prior to the execution of the release. Consequently, it is important for the contracting officer to ensure that he/she made it clear to the contractor that the negotiations were intended to resolve all outstanding issues. This could have been done in a number of ways. The easiest way would have been to list all of the outstanding matters in a letter to the contractor clearly stating that the contracting officer intended to resolve all matters listed in the letter. In addition, at the first meeting to discuss the modification, the contracting officer should have given the contractor a written agenda that set forth all of the outstanding matters and stated that the contracting officer will only agree to a modification that resolves all matters on the list. Finally, each Government representative that participated in negotiations on the modification should have made a memorandum of each session which stated the contractor was advised the Government will only enter into a modification that resolves all outstanding matters.

Prior to acting on the contractor's new request for unabsorbed overhead, you should carefully investigate the facts

¹ Southeastern, Inc., ASBCA Nos. 7677 & 8614, 1963 BCA ¶ 3904.

² Green Builders, Inc., ASBCA No. 35518, 88-2 BCA ¶ 20,734.

leading up to the execution of the release. The Board will give more weight to a statement made several months before an appeal is filed than to one made afterwards. Furthermore, you will not be able to properly assist the contracting officer in making the correct decision if you are not fully aware of facts and circumstances leading up to the execution of the modification. If you are lucky, you will find that the contracting officer took steps similar to those listed in the above paragraph.

The Final Decision

The second area the Board will examine is the final decision and correspondence leading up to it. As such, it is essential that the record clearly establish the contracting officer relied on the release when he/she denied the delay claim. The Board will not find that a release bars a claim if the contracting officer did not rely on the release at the time

he/she denied the later claim.³ Consequently, you should ensure that the contracting officer's initial letter to contractor specifically states that he/she believes the contractor released the claim in question when the modification was issued; that all subsequent letters reiterate this statement, and that the final decision lists all relevant correspondence and clearly states the contracting officer relied on the release in denying the new unabsorbed overhead claim.

Conclusion

The point to remember is an effective release does not consist of written words alone. The Board will look at the parties' conduct before and after the execution of the release to determine the parties' true intent. Consequently, it is essential to ensure the record clearly establishes that the Government intended to enter into a release barring all claims known at the time the release was signed.

³ Bromley Contracting Company, Inc., ASBCA No. 20271, 77-2 BCA ¶ 12,715 at 61,762.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Is Absence Without Leave a Continuing Offense?

In *United States v. Jones*,¹ the Army Court of Military Review reversed the accused's conviction for absence without leave (AWOL)² because of the statute of limitations. Central to the court's rationale was its reaffirmation that AWOL is not a continuing offense, but rather is a crime which is instantaneously committed at the inception date. The *Jones* case thus represents the most recent judicial pronouncement regarding the subject of ongoing debate—is AWOL a continuing offense?³

In *Jones*, the accused was charged with desertion from 20 June 1984 to 28 January 1987.⁴ The sworn charges were received by the officer exercising summary court-martial jurisdiction over the accused on 6 April 1987.⁵ The defense

counsel moved for a finding of not guilty to the lesser included offense of AWOL based on the two-year statute of limitations then in effect.⁶ The military judge denied the motion, holding that the new five-year statute of limitations applied.⁷ The military judge ultimately found the accused guilty of AWOL from 20 June 1985 to 28 January 1987.⁸

The Army Court of Military Review reversed, holding that the new five-year statute of limitations applied only to offenses that occurred on or after 14 November 1986.⁹ As AWOL was determined not to be a continuing offense by the court, the accused's crime was thus committed prior to the effective date of the five-year period. The accused's conviction was accordingly reversed as being barred by the statute of limitations.

¹ ACMR 8701537 (A.C.M.R. 10 Aug. 1988).

² A violation of Uniform Code of Military Justice art. 86, 10 U.S.C. § 886 (1982) [hereinafter UCMJ].

³ See generally, A. Avins, *The Law of AWOL* (1957); Lederer, *Absence Without Leave—The Nature of the Offense*, *The Army Lawyer* 4 (1974); and the cases cited *infra* note 10.

⁴ *Jones*, slip op. at 2.

⁵ *Id.*

⁶ *Id.*, slip op. at 2-3 (citing UCMJ art. 43(c)) ("[A] person charged with an offense is not liable to be tried by court-martial . . . if the offense was committed more than two years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.").

⁷ See generally National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 805(c), 100 Stat. 3816, 3908 (1986) (amending UCMJ art. 43 (1982)). The law was changed to provide that the statute of limitations precludes court-martial for non-capital offenses more than five years before the charges were received by the summary court-martial officer. UCMJ art. 43(c) (Supp. IV 1986). Additionally, "periods in which the accused is absent without authority or fleeing from justice shall be excluded in computing the period of limitation prescribed" by the article 43(c). *Id.* As noted by the Army Court of Military Review, "[t]he amendments to Article 43 conform the statute of limitations in the UCMJ to the civilian counterpart provisions of Chapter 213 of title 18, United States Code, by replacing the two-year and three-year limitations with a five-year limitation and by tolling the running of the limitation during any period of unauthorized absence or flight from justice. See H.R. Conf. Rep. No. 1001, 99th Cong., 2d Sess. 493 (1986) reprinted in 1987 U.S. Code Cong. & Admin. News 6529, 6552." *Jones*, slip op. at 3 n.3.

⁸ *Jones*, slip op. at 3.

⁹ *Id.*, slip op. at 5 (citing National Defense Authorization Act for Fiscal Year 1987, *supra* note 7).

The court's characterization of AWOL as not being a continuing offense, though often repeated,¹⁰ is analytically unsound. First, the gravamen of AWOL is the continuous avoidance of military duties. The offense has, in that sense, a continuing impact upon mission and morale. Second, the courts have repeatedly ignored the maxim that "AWOL is not a continuing offense" to achieve sound results on appeal when the providence inquiry establishes a different inception date¹¹ or the government can only prove the termination date.¹² This practice of calling AWOL an instantaneous offense, but treating it as a continuing offense, reveals that the accepted judicial characterization of the crime is flawed.

Two principal reasons are apparent for the court's characterization of AWOL as an instantaneous rather than a continuing offense. One is the judicial concern that the government will avoid operation of the statute of limitations, as in *Jones*, if AWOL is not treated as an instantaneous offense. Given the recent extension of the statute of limitations to five years with a tolling of the period during times of unauthorized absence,¹³ however, the potential for this abuse is largely removed. Indeed, Congress' plain intent in article 43(c) is to restrict severely the scope of the statute of limitations defense as it applies to AWOL offenses.¹⁴ The command is no longer required to prefer charges and forward them to the summary court officer within two years of the inception date of an AWOL in order to comply with the statute of limitations. In virtually every conceivable case, the command may now wait until an AWOL soldier is returned to military control before preferring charges. Thus, a primary reason for the courts' mischaracterization of AWOL as an instantaneous offense has been removed statutorily.

The other identifiable reason for mischaracterizing AWOL is the fear of an unreasonable multiplication of offenses and multiple trials. The constitutional protections against multiplicity¹⁵ and former jeopardy¹⁶ are more than adequate to respond to these factors. Moreover, the appellate courts have been vigilant to protect against an unreasonable multiplication of charges without resort to the statute of limitations.¹⁷

The better approach is to recognize that AWOL is a continuing crime—a "renewed offense"¹⁸ that punishes a "course of conduct."¹⁹ This would harmonize the seemingly conflicting judicial pronouncements based upon a sound analytical framework. None of the potential harms that prompted the mischaracterization of AWOL as an instantaneous offense would be risked, as alternative means for responding to these concerns are available to the courts. The time has come to reexamine and reject the legal fiction that "AWOL is not a continuing offense." CPT Milhizer.

The Court of Military Appeals Expands False Official Statement Under Article 107, UCMJ

In *United States v. Jackson*,²⁰ the accused was convicted of making a false official statement in violation of article 107, UCMJ.²¹ The conviction was based upon misleading information provided by the accused to a Criminal Investigation Command (CID) agent concerning the whereabouts of a suspect.

Specifically, the CID investigation had focused on an acquaintance of the accused as a suspect of a recent homicide.²² As the accused and the suspect were known acquaintances, and as an automobile linked to the suspect was seen in the vicinity of the accused's apartment, the accused was approached by a CID agent to be interviewed.²³ After the agent identified himself and told the accused that he was investigating a homicide, he asked the accused when

¹⁰ See, e.g., *United States v. Jackson*, 20 M.J. 83, 84 (C.M.A. 1985); *United States v. Francis*, 15 M.J. 424, 427 (C.M.A. 1983); *United States v. Rodgers*, 1 M.J. 20 (C.M.A. 1970); *United States v. Emerson*, 1 C.M.R. 43 (C.M.A. 1951); *United States v. Newton*, 11 M.J. 580 (N.M.C.M.R. 1980); *United States v. Irving*, 2 M.J. 967 (A.C.M.R. 1976).

¹¹ For example, in *United States v. Harris*, 45 C.M.R. 364 (C.M.A. 1972), the accused was convicted of AWOL with an inception date of 3 December 1969. *Id.* at 365. The convening authority, upon the advice of the staff judge advocate, changed the inception date to 2 January 1970 when taking his action. *Id.* at 366. The Court of Military Appeals found insufficient evidence to support the convening authority's action and further amended the inception date to 9 January 1970. *Id.* at 368. See also *United States v. Daly*, 15 M.J. 739 (N.M.C.M.R. 1983) (guilty plea to AWOL with inception date of 9 September held to be provident, even though accused admitted leaving on 6 September); *United States v. Brock*, 13 M.J. 766 (A.F.C.M.R. 1982) (guilty plea to AWOL with inception date of 14 October held to be provident, even though accused admitted leaving on 13 October); *United States v. Porter*, 12 M.J. 949 (N.M.C.M.R. 1982) (guilty plea to AWOL with inception date encompassed by a larger period of AWOL was provident).

¹² If the government can prove the termination date but not the inception date of an AWOL, the accused can be convicted for a one-day AWOL on the termination date. See *United States v. Mahan*, 1 M.J. 303 (C.M.A. 1976). This result is inconsistent with the characterization of AWOL as an instantaneous offense, for if the act of leaving is the completed offense, the accused could not be guilty of absents himself on the date he returned. See also *United States v. Gallow*, 43 C.M.R. 720 (A.C.M.R. 1971) ("Dropped from the Rolls" entry in morning report was sufficient to establish the inception date for AWOL).

¹³ See *supra* note 7.

¹⁴ This desire to restrict application of the statute of limitations may be explained, in part, by the fact that the defense is not based on the lack of culpability of the accused, but depends instead on public policy arguments. See 2 P. Robinson, *Criminal Law Defenses*, § 202(b) (1984).

¹⁵ U.S. Const. amends. V and VI.

¹⁶ U.S. Const. amend. V.

¹⁷ For example, in *United States v. Taylor*, 26 M.J. 7 (C.M.A. 1988), the Court of Military Appeals found that the accused was the victim of an unreasonable multiplication of charges where he was convicted of 15 specifications of dereliction of duty and 17 specifications of failure to go to his appointed place of duty based upon a single six-day work stoppage that occurred while he remained on board ship. The court affirmed the accused's conviction only for a willful dereliction of all his duties on each day of his inactivity. See also *United States v. Sturdivant*, 13 M.J. 323, 329-30 (C.M.A. 1982).

¹⁸ Avins, *supra* note 3, at 69.

¹⁹ Lederer, *supra* note 3, at 8.

²⁰ 26 M.J. 377 (C.M.A. 1988).

²¹ Uniform Code of Military Justice art. 107, 10 U.S.C. § 907 (1982) [hereinafter UCMJ].

²² *Jackson*, 26 M.J. at 378.

²³ *Id.*

she had last seen the acquaintance.²⁴ The accused responded, "Two weeks ago."²⁵ Later, confronted by evidence that pointed to the acquaintance's recent presence in her quarters,²⁶ the accused admitted that her answer was false and that the acquaintance had been in her quarters at about 0300 that morning.²⁷

The Court of Military Appeals first reaffirmed its precedent of finding a "general analogy" between article 107 and 18 U.S.C. § 1001, which prohibits the knowing and willful making of a "false . . . or fraudulent statement" concerning "any matter within the jurisdiction of any department or agency of the United States."²⁸ The court then revisited some of its earlier decisions construing the scope of article 107. In particular, the court acknowledged its prior holdings that a false statement to an investigator, when made by a suspect who had no independent duty to answer his questions, was not "official" within the purview of article 107.²⁹ The court explained that this interpretation of article 107 was based upon the interpretation then given to 18 U.S.C. § 1001 by the federal civilian courts.³⁰

More recently, in *United States v. Rodgers*,³¹ the Supreme Court unanimously determined that a defendant's false reports to the Federal Bureau of Investigation (FBI) "that his wife had been kidnapped" and to the Secret Service that she had been "involved in a plot to kill the President" was a "matter within the jurisdiction" of a department or agency of the United States.³² The Supreme Court held that "[a] statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under § 1001."³³ According to the Supreme Court, a statutory basis existed for the authority of the FBI and the Secret Service to conduct investigations

based upon the defendant's false reports. Since *Rodgers* was decided, 18 U.S.C. § 1001 has been construed broadly by the federal civilian courts.³⁴

In *Jackson*, the Court of Military Appeals decided to interpret article 107 in a manner consistent with *Rodgers*.³⁵ Construed in this way, the court affirmed the accused's conviction for a false official statement for providing misleading information about a criminal suspect's whereabouts to a law enforcement investigator. The court concluded that "even if not subject to an independent 'duty to account,' a servicemember who lies to a law-enforcement agent conducting an investigation as part of his duties violates Article 107."³⁶

The *Jackson* decision thus expands the scope of article 107 in several important respects. First, it clearly establishes that a false or misleading statement to a person conducting an official investigation constitutes a false official statement. Article 107 would apparently reach statements given by either suspects or witnesses, sworn or unsworn, regardless of who initiated the investigation. This represents the most significant broadening of the scope of article 107 since *Collier*,³⁷ when the court, in 1974, found that article 107 applies to false reports of a crime that were initiated by the accused.³⁸

Second, the *Jackson* decision finds that the scope of article 107 reaches statements that are misleading, even if not technically false. This expansive application is distinguishable from the court's more restrictive interpretation of false swearing under article 134.³⁹ Unlike the broad scope of article 107 as determined in *Jackson*, the court has held that a

²⁴ *Id.*

²⁵ *Id.*

²⁶ The CID agent found fresh blood in the quarters. *Id.* at 378 n.2.

²⁷ *Id.* at 378.

²⁸ *Id.* (citing *United States v. Hutchins*, 18 C.M.R. 46, 50 (C.M.A. 1955)). This language was found to be the substantial equivalent of "official" as used in article 107. *Jackson*, 26 M.J. at 378 (citing *United States v. Ragins*, 11 M.J. 42 (C.M.A. 1981) and *United States v. Aronson*, 25 C.M.R. 29 (C.M.A. 1957)).

²⁹ *Jackson*, 26 M.J. at 378 (citing *United States v. Osborne*, 26 C.M.R. 235 (C.M.A. 1958) and *United States v. Aronson*, 25 C.M.R. 29 (C.M.A. 1957)); see also *United States v. Davenport*, 9 M.J. 364, 367-68 (C.M.A. 1980).

³⁰ *Jackson*, 26 M.J. at 378, (citing *United States v. Levin*, 133 F.Supp. 88, 90 (D.Colo. 1953)). Although the Court of Military Appeals later distinguished the *Aronson-Osborne* line of cases in *United States v. Collier*, 48 C.M.R. 789 (C.M.A. 1974) (false report to military police that stereo reverberator unit was stolen), these cases had never been overruled.

³¹ 466 U.S. 475 (1984).

³² *Id.*, 466 U.S. at 479.

³³ *Id.*, 466 U.S. at 481 (quoting *Bryson v. United States*, 396 U.S. 64, 71 (footnote omitted)).

³⁴ See *United States v. Plasencia-Orozco*, 768 F.2d 1074 (9th Cir. 1985) (defendant lied to federal magistrate performing administrative function); *United States v. Gonzalez-Mares*, 752 F.2d 1485 (9th Cir.), cert. denied, 473 U.S. 913, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985) (defendant lied to probation officer in pre-plea interview); *United States v. Morris*, 741 F.2d 188 (8th Cir. 1984) (defendant lied to Internal Revenue Service agent).

³⁵ *Jackson*, 26 M.J. at 379.

³⁶ *Id.*

³⁷ *United States v. Collier*, 48 C.M.R. 789 (C.M.A. 1974) (false report of a theft to the military police); see also *United States v. Ragins*, 11 M.J. 42 (C.M.A. 1981) (accused signed invoices indicating that bread had been delivered to a commissary store when, in fact, no bread had been delivered and the accused had sold the bread to a third party for cash).

³⁸ In some respects *Collier* presages *Rodgers*, as it finds that an accused's false report of a crime constitutes a false official statement. When *Collier* was decided, the federal civilian courts disagreed as to the scope of conduct reached by 18 U.S.C. § 1001. Compare *Friedman v. United States*, 374 F.2d 363 (8th Cir. 1967) (the term "jurisdiction" in 18 U.S.C. § 1001 excludes investigatory aspects of the FBI), with *United States v. Bedore*, 455 F.2d 1109 (9th Cir. 1967), and *United States v. Adler*, 380 F.2d 917 (2d Cir. 1967) (18 U.S.C. § 1001 includes false reports of a crime to federal law enforcement agencies). Although the Court of Military Appeals in *Collier* decided to follow the more expansive interpretation given to the federal statute in *Bedore* and *Adler*, its opinion was nonetheless narrowly drawn. The court found, for example, that the "report of a crime to law enforcement personnel carries with it indicia of officiality;" and, that "[m]aking a false report . . . triggers this [governmental] machinery . . . [and] pervers[is the] investigatory process." *Collier*, 28 C.M.R. at 791. With the Supreme Court's subsequent decision to adopt the broader interpretation of 18 U.S.C. § 1001 in *Rodgers* as support, the Court of Military Appeals in *Jackson* was willing to give article 107 a far more expansive application.

³⁹ See Manual for Courts-Martial, United States, 1984, Part IV, para. 79 [hereinafter MCM, 1984].

literally true but misleading response to a question cannot serve as the basis for a false swearing conviction.⁴⁰

Taken together, the practical impact of these changes to the law could be dramatic. Commanders now have a firmer basis for proceeding against soldiers who mislead investigators. Trial counsel no longer need to charge such misconduct under other more questionable theories, such as obstruction of justice⁴¹ or general disorder.⁴²

Indeed, as the focus is now upon the officiality of the investigation and not upon the subject's duty to account, the potential reach of article 107 is even greater.⁴³ For example, as commanders have a prominent law-enforcement role in the military justice system,⁴⁴ false or misleading statements to them when acting in that capacity could serve as the basis for an article 107 violation.⁴⁵ Moreover, false or misleading statements during administrative investigations could likewise serve as the basis for an article 107 violation, provided that the investigator is acting pursuant to an Army regulation or other competent authority.⁴⁶

A final issue raised by *Jackson* concerns the continued vitality of the "exculpatory no" doctrine under military law.⁴⁷ The "exculpatory no" doctrine has always been limited to cases where the subject's statements—generally no more than a mere denial—impede a governmental function.⁴⁸ Prior to *Jackson*, the Court of Military Appeals seemed to require that the subject have a duty to account as a prerequisite for finding that a governmental function was

implicated and, therefore, possibly impeded.⁴⁹ This reasoning was consistent with the court's interpretation of article 107 before *Jackson*, which limited its scope to statements concerning matters for which the subject had an official duty to account.⁵⁰ Because *Jackson* has expanded the reach of article 107 to include all statements which impeded a governmental function regardless of a duty to account, the scope of the "exculpatory no" defense has presumably been diminished. Thus, although *Jackson* may not completely remove the defense,⁵¹ it apparently limits its application to those cases where the governmental function was neither impeded nor perverted by the false or misleading statement.⁵² As impeding or perverting a governmental function is now the gravamen of an article 107 offense, the "exculpatory no" doctrine has evolved into no more than a simple failure of proof defense, such as alibi. CPT Milhizer.

Pretrial Confinement Pending A Government Appeal

Introduction

As part of the Military Justice Act of 1983,⁵³ the prosecution was given the right, in limited situations, to appeal adverse rulings by the military judge. This procedure, codified at article 62, UCMJ,⁵⁴ cured a severe inequity in the military justice system, that had often left the prosecution without remedy no matter how erroneous the military judge's decision. Nevertheless, despite the fourth anniversary of its addition to the UCMJ, many questions in the

⁴⁰ *United States v. Arondel De Hayes*, 22 M.J. 54 (C.M.A. 1986); see *United States v. Purgess*, 33 C.M.R. 197 (C.M.A. 1963). Interestingly, this more restrictive interpretation of false swearing is based in part upon Supreme Court precedent. See *Brønston v. United States*, 409 U.S. 352 (1973).

⁴¹ See MCM, 1984, Part IV, para. 96. Although the *Manual* provision for obstruction of justice is broader than the federal statute (*United States v. Ridgeway*, 13 M.J. 742 (A.C.M.R. 1982)), it has never been applied so as to reach the conduct at issue in *Jackson*. See, e.g., *United States v. Long*, 6 C.M.R. 60 (C.M.A. 1952) (assaulting a witness who has testified); *United States v. Rosario*, 19 M.J. 698 (A.C.M.R. 1984), and *United States v. Rossi*, 13 C.M.R. 896 (A.F.B.R. 1953) (intimidating potential witnesses without regard to whether a firm decision to testify had been made); *United States v. Chadkowski*, 11 M.J. 605 (A.F.C.M.R. 1981), and *United States v. Dominger*, 31 C.M.R. 521 (A.F.B.R. 1961) (intimidating a witness who was to appear before an article 32, UCMJ investigating officer); *United States v. Deloney*, 44 C.M.R. 367 (A.C.M.R. 1971) (attempting to influence a witness to retract a statement); *United States v. Favors*, 48 C.M.R. 873 (A.C.M.R. 1974) (concealing potential evidence pertaining to an alleged criminal offense by another); *Rosario*, 19 M.J. 698 (A.C.M.R. 1984), and *United States v. Caudill*, 10 M.J. 787 (A.F.C.M.R. 1981) (threatening a person who understood the threat as an inducement to testify falsely if he was called as a witness); *United States v. Gomez*, 15 M.J. 594 (A.C.M.R. 1983) (attempting to have a witness falsely provide an alibi).

⁴² *United States v. Kellough*, 19 M.J. 871 (A.F.C.M.R. 1985) (not obstruction of justice to "plant" evidence where no criminal proceeding was pending; offense is a disorder under article 134, UCMJ).

⁴³ Even before *Jackson*, uniquely military applications of article 107 were recognized. For example, a serviceperson's self-identification is an official statement. See *United States v. Shepherd*, 25 C.M.R. 352 (C.M.A. 1958) (as part of a weight-reduction program, the accused was required to submit periodic reports of his weight; submitting a false report would violate article 107); see also *United States v. Davenport*, 9 M.J. 364 (C.M.A. 1980) (accused falsely identified himself).

⁴⁴ *United States v. Reeves*, 21 M.J. 768, 769 (A.C.M.R. 1986) ("Further, it is a commander, and not the provost marshal or criminal investigation division chief, who is primarily responsible for discipline, law and order within his command. Arguments to the contrary do not impress this court.") (emphasis in original).

⁴⁵ See *United States v. Cummings*, 3 M.J. 246 (C.M.A. 1977) (false statement to a sergeant concerning vehicle registration on post does not violate article 107, as the pertinent Army regulation imposes the responsibility on the unit commander to insure compliance with registration requirements).

⁴⁶ For example, investigation pursuant to Army Reg. 15-6, Procedure for Investigating Officers and Boards of Officers (11 May 1988).

⁴⁷ Under the "exculpatory no" doctrine, a person who gives a merely negative response to the question of a law enforcement agent cannot be prosecuted under 18 U.S.C. § 1001. See, e.g., *United States v. Abrahams*, 604 F.2d 386, 394-95 (5th Cir. 1979); *United States v. Bedore*, 455 F.2d 1109 (9th Cir. 1972); *Pasternostro v. United States*, 311 F.2d 298 (5th Cir. 1962). The "exculpatory no" doctrine has been adopted by the Court of Military Appeals. See *United States v. Davenport*, 9 M.J. 364, 369-70 (C.M.A. 1980); see also *United States v. Gay*, 24 M.J. 304 (C.M.A. 1987).

⁴⁸ See generally *Davenport*, 9 M.J. at 370, and the cases cited therein.

⁴⁹ In *Davenport*, for example, the court observed:

In short, appellant's false statement to Staff Sergeant Welch—a statement which went beyond a mere denial—tended to impede a "governmental function." Since *Davenport* had a duty to account for his time and whereabouts so that he could be utilized for military service, his falsehood impeded performance of that duty.

Id. at 370.

⁵⁰ See *supra* note 29. But see *Collier*, 48 C.M.R. at 791.

⁵¹ *Jackson*, 26 M.J. at 379 n.3, and the cases cited therein.

⁵² See *United States v. Medina de Perez*, 799 F.2d 540, 546-47 (9th Cir. 1986); *United States v. Lambert*, 501 F.2d 943, 946 (5th Cir. 1974) (en banc).

⁵³ Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983).

⁵⁴ Uniform Code of Military Justice art. 62, 10 U.S.C. § 862 (1985) [hereinafter UCMJ].

article 62 process, are unresolved. One of those questions—continuing pretrial confinement during the government's appeal—has, however, been recently answered by the Navy-Marine Court of Military Review in *United States v. Frage*.⁵⁵

United States v. Frage

Ship's Serviceman Second Class Fritz Frage was charged with desertion terminated by apprehension, larceny of food and unauthorized sale of that same food. His desertion began in October, 1983 and was terminated on 11 February 1988. On 28 June 1984, the charges were sworn to in front of the Assistant Administrative Officer at Roosevelt Roads Naval Station. Unfortunately, that officer was not qualified to administer oaths, although he believed that he had that power. At trial, the defense moved to dismiss all charges, based on the unsworn charges now being past the statute of limitations. The military judge granted the motion.

The government appealed pursuant to article 62, UCMJ.⁵⁶ On appeal, the government argued that this was purely an error of form and that the accused should not profit when the government was clearly acting in good faith.⁵⁷ The Navy-Marine Court of Military Review [N.M.C.M.R.], however, agreed with the defense and found that since the charges were improperly sworn, that the statute of limitations had run. Accordingly, the military judge's decision was affirmed. This, however, was only the first battle.

Frage v. Edington

When Frage returned to military control on 11 February 1988, he was placed in pretrial confinement. And while the military judge granted his motion to dismiss the charges, the military judge denied his subsequent motion to be released from pretrial confinement pending the government's appeal. Frage's counsel then filed a writ of habeas corpus to obtain his release and the N.M.C.M.R. faced an issue of first impression in article 62 procedure.

The government argued that the decision to confine an accused rests with the convening authority and the military judge as guided by the general rules for pretrial confinement set forth in R.C.M. 305(d).⁵⁸ The N.M.C.M.R. agreed in part. The court held that continued pretrial confinement is generally authorized during the pendency of a government appeal, assuming the confinement was lawfully ordered in the first place.⁵⁹ But, at the same time, the court excluded situations where the trial court was barred from proceeding due to the trial judge's ruling. Thus, in the case

at bar, where further prosecution was barred by Frage's invocation of the statute of limitations, continued pretrial confinement was improper.

In the Navy Court's opinion, continued pretrial confinement during the pendency of article 62 appeals must satisfy two tests. First, the confinement must initially be properly imposed under R.C.M. 305(d) and second, the questioned ruling by the military judge must not be a bar to further prosecution. Thus, if the subject-matter of the appeal is a suppression motion or other evidentiary motion, that might allow further prosecutorial action, pretrial confinement would be proper.⁶⁰

Conclusion

The *Frage* decision follows trends in the civilian federal courts. Article 62, UCMJ was based on the right of government appeal under 18 U.S.C. § 3731 in the federal district courts. Recent amendments to that statute have expanded the government's ability to confine the accused during the pendency of an appeal. In fact, in the most recent amendment to 18 U.S.C. § 3731,⁶¹ continued pretrial confinement is controlled by referral to the general requirements for pretrial confinement under 18 U.S.C. § 3143(c),⁶² much as the Navy Court did in *Frage* by its referral to R.C.M. 305(d). Moreover, because unrelated charges are often tried together in a single court-martial, unlike federal civilian trials, continued pretrial confinement of the military accused may be a necessary alternative. MAJ Williams.

Withdrawal of Command Sponsorship for a Potential Defense Witness

*Santiago-Davila*⁶³ will be remembered as the case that applied *Batson* to courts-martial. The Court of Military Appeals, however, granted two issues for review in *Santiago-Davila*. While the *Batson* issue received the most attention, Issue I⁶⁴ has the most direct impact on judge advocates and commanders overseas because it provides guidance on when the command may withdraw sponsorship of a potential defense witness.

Sergeant Santiago was convicted at a general court-martial in Darmstadt, Federal Republic of Germany, on 10 July 1985, for possessing and distributing marijuana and possessing drug paraphernalia. The distribution occurred in his government quarters at Lincoln Village, Darmstadt, and the drugs and paraphernalia were found when his quarters were searched.

Nine days after the search, on 11 April 1985, Santiago submitted a written request to his commander asking that

⁵⁵ This case is reported in two separate opinions:

United States v. Frage, 26 M.J. 924 (N.M.C.M.R. 1988) (government's appeal of trial judge's ruling) and *Frage v. Edington*, 26 M.J. 927 (N.M.C.M.R. 1988) (writ of habeas corpus by the defense).

⁵⁶ UCMJ art. 62.

⁵⁷ *United States v. Frage*, 26 M.J. at 926.

⁵⁸ Manual for Courts-Martial, United States, 1984, Rule for Court-Martial 305(d).

⁵⁹ *Frage v. Edington*, 26 M.J. at 928.

⁶⁰ *Id.* at n.2.

⁶¹ 18 U.S.C.A. § 3731 (West Supp. 1988).

⁶² 18 U.S.C.A. § 3143(c) (West Supp. 1988).

⁶³ 26 M.J. 380 (C.M.A. 1988).

⁶⁴ "Whether the military judge erred to the substantial prejudice of appellant by denying the defense motion for appropriate relief concerning the presence of appellant's wife at his court-martial." *Id.* at 381.

his wife and two children "not be returned to CONUS at this time" as his wife "may well be a crucial witness" in his case and was needed to assist in the preparation of his defense.⁶⁵ The critical link between Mrs. Santiago and Santiago's case was the use of their quarters for the distribution of drugs and the discovery of the drugs in their quarters.

Shortly after Santiago's request was received by the command, Santiago was notified that all logistical support, except medical care, would be withdrawn from his family members, and they were to return to CONUS by 28 May 1985.⁶⁶

On 26 June 1985, Santiago requested his wife as a witness at his court-martial as she would allegedly testify that she was the sole owner, without her husband's knowledge, of the marijuana and drug paraphernalia. The government contacted Mrs. Santiago, but invitational travel orders, \$825.00 for travel expenses, and \$225.00 per diem could not entice her to return to Germany. Although she was living with her sister, and apparently would not be gone for more than four days, Mrs. Santiago refused to travel to Germany insisting that she could not leave her children.

Civilian defense counsel argued that Mrs. Santiago was unavailable because of the government's actions in withdrawing command sponsorship and a "drastic remedy" was called for "because of the Government's cavalier attitude in this case."⁶⁷

Defense counsel specifically requested a change of venue, a video tape deposition, abatement of certain specifications, expenses paid for the children, or babysitting services provided by the government. The judge denied the defense requests, and Mrs. Santiago's stipulation of expected testimony, in which she claimed sole knowledge and responsibility for the offenses, was offered into evidence.⁶⁸

The Court of Military Appeals soundly rejected as "naive" the government's argument that it was not reasonable for Mrs. Santiago leaving Germany because she enjoyed the "same travel privileges as other citizens of the United States," and could not be forced to return to the United States.⁶⁹ After recognizing that the government was responsible, the Court of Military Appeals then looked at the purpose behind the government's withdrawal of command sponsorship, and determined it was "entirely reasonable."⁷⁰ The Court of Military Appeals specifically mentioned the following factors as supporting the government's actions: Mrs. Santiago participated or was aware of drug distribution out of their government quarters; U.S. military authorities did not have jurisdiction over her; and it was appropriate to ensure that she did not engage in further

criminal activity or use government quarters for such activity. The court stated that the government's purpose should not be to deprive Santiago of his wife's testimony.⁷¹ Therefore, as long as the government's purpose is pristine, the court supports the command's actions in withdrawing sponsorship even when it makes a potential witness unavailable.

In a situation where the availability of a defense-requested witness may be affected, the government should be prepared to specifically articulate the "reasonable purposes" for the withdrawal of command sponsorship. Under *Santiago-Davila*, those "reasonable purposes" may include preventing future criminal activity, particularly in government quarters. The court will then examine the "reasonable efforts" by the government to make the witness available. In *Santiago-Davila*, "reasonable efforts" were invitational travel orders and the offer to pay expenses.⁷²

Other situations may arise that will not be as clear cut. For instance, what if Santiago had been distributing drugs in the company area, and there was no evidence that Mrs. Santiago was aware of his activities? Add to that hypothetical the claim by Santiago that his wife would be an alibi witness for times that he was allegedly distributing drugs. What would be the "entirely reasonable purpose" if the command wanted to withdraw sponsorship and send Mrs. Santiago back to the United States, making her unavailable as a witness? That is a much closer question. Convenience to the command or avoidance of future embarrassment to the command would probably not be "entirely reasonable" and would approach the impermissible purpose of depriving Santiago of a witness.

Judge advocates, particularly those stationed overseas, should consider deposing and perhaps videotaping a potential witness like Mrs. Santiago before her command sponsorship is withdrawn. The Court of Military Appeals supports the use of a videotaped deposition as "a useful means of presenting to the factfinder the testimony of a witness whose presence in court cannot be obtained. . . ."⁷³

In *Santiago-Davila*, the court upheld the military judge's decision to deny the alternatives to live testimony requested by the defense. It appeared, however, to be a close call: "[u]nder the circumstances of this case, we do not believe that he [military judge] abused his discretion in opting for a stipulation of expected testimony."⁷⁴ Delay, cost, and difficulty in obtaining the videotaped deposition supported the judge's decision. That would not be true in all cases, however, and a trial counsel might be facing a change of venue, a lengthy delay to depose a witness, or dismissal of charges. When overseas, anticipate an absent witness, particularly a family member returned to the United States, and take all possible preventive measures to preserve the testimony of a potential witness, MAJ Merck.

⁶⁵ *Id.* at 382.

⁶⁶ *Id.* at 382.

⁶⁷ *Id.* at 383.

⁶⁸ *Id.* at 384.

⁶⁹ *Id.* at 388.

⁷⁰ *Id.* at 388.

⁷¹ *Id.* at 388.

⁷² *Id.* at 388.

⁷³ *Id.* at 389.

⁷⁴ *Id.* at 389.

Contract Law Note

Bankruptcy and Government Contract Law

A recent article in the National Law Journal stated that "Bankruptcy counsel with an awareness of how the code intersects with government contract law will enjoy a significant advantage in dealing with a government customer or creditor."⁷⁵ The reason offered for this advantage was that many government personnel, unlike their private sector counterparts, have little appreciation of bankruptcy law.⁷⁶ This note is intended to neutralize some of this alleged advantage. It will discuss three significant intersections of the Bankruptcy Code and government contract law: the automatic stay,⁷⁷ the prohibition against discrimination,⁷⁸ and the definition of a bankruptcy claim.⁷⁹

The Automatic Stay

The automatic stay is a very broad, liberally interpreted statutory provision that prevents the government from pursuing a contractual right or claim against a contractor who has filed a petition in bankruptcy.⁸⁰ Affected actions include dispute proceeding at the Armed Service Board of Contract Appeals, set offs, and demands for payment. Additionally, the stay prevents the contracting officer from terminating a contract under the Default clause,⁸¹ and could arguably prevent the contracting officer from rendering any final decision.

There are some significant limitations to the effect of a stay. It does not shield the debtor from criminal proceedings⁸² that might be commenced, for example, as a result of contract fraud. It also does not shield the debtor from enforcement of regulatory or police powers.⁸³ Regulatory or police powers include only generally applicable regulatory laws intended to protect public health, safety, and welfare. Actions to enforce contractual rights (e.g., a termination) are excluded.⁸⁴ Whether debarment and suspension proceedings⁸⁵ would fall within the police or regulatory power exception is an open issue. It seems likely that they would

because they are imposed in the public interest for the Government's protection.⁸⁶ The stay is effective until either the case is dismissed or the discharge is granted or denied.⁸⁷ To obtain earlier relief, the government must petition the court to lift the stay.⁸⁸

The recent case of *In re West Electronics, Inc.*⁸⁹ provides a favorable government precedent for relief from the stay. The case involved a government contract under which the contractor had received a show cause notice, but had filed a petition in bankruptcy before the contract could be terminated. Hence, the automatic stay provision prevented termination. The basis for relief from the stay in *West* was 11 U.S.C. § 365(c)(1) and the Nonassignment Act.⁹⁰ 11 U.S.C. § 365(c)(1) prevents a trustee or debtor in possession from assuming an executory contract where the other party is excused by law from accepting performance from a third party. The Nonassignment Act excuses the government from accepting performance from a third party. Since *West* was thus prevented from assuming the contract, the court held that the district court had abused its discretion by refusing to lift the stay.

The benefits to be derived from *West* are twofold. First, it provides a convenient basis for relief from the stay where a bankrupt contractor is in default. Second, it should provide some food for thought on the use of show cause notices. The show cause notice is not required by either the FAR or the Default clause. Generally, its use is advisable to surface any excusable delays or other potential problems with a proposed termination under the Default clause.⁹¹

In some instances, this advantage may be outweighed by potential practical consequences. In *West*, the show cause notice was probably a significant factor precipitating the filing of the bankruptcy petition. Subsequently, the government spent a year and a half litigating the automatic stay issue. During that time, it was unable to use the funds that remained obligated on the contract. This is a serious consequence which the contract attorney should weigh

⁷⁵ National Law Journal, May 23, 1988, at 45, col. 1.

⁷⁶ *Id.*

⁷⁷ 11 U.S.C. § 362(a) (Supp. IV 1986).

⁷⁸ 11 U.S.C. § 525(a) (Supp. IV 1986).

⁷⁹ 11 U.S.C. § 101(4) (1982).

⁸⁰ 11 U.S.C. § 362(a).

⁸¹ *Harris Products, Inc.*, ASBCA No. 30426, 87-2 BCA 19,807. An executory contract (a contract under which performance has not been completed) is considered to be property of the bankruptcy estate under 11 U.S.C. § 541. The automatic stay provision prevents any act to exercise control over this property. 11 U.S.C. § 362(a)(3). Thus, terminating a contract without the approval of the bankruptcy court has been held to violate the automatic stay provision. *In Re Computer Communications, Inc.*, 824 F.2d 725 (9th Cir. 1987).

⁸² 11 U.S.C. § 362(b)(1) (1982).

⁸³ 11 U.S.C. § 362(b)(4) (1982).

⁸⁴ *In Re Corporacion de Servicios Medicos Hospitalarios de Fajardo*, 805 F.2d 440 (1st Cir. 1986).

⁸⁵ Fed. Acquisition Reg. subpart 9.4 (1 Apr. 1984) [hereinafter FAR].

⁸⁶ FAR 9.402(b).

⁸⁷ 11 U.S.C. § 362(c)(2) (Supp. IV 1986).

⁸⁸ 11 U.S.C. § 362(d) (Supp. IV 1986).

⁸⁹ 852 F.2d 79 (3d Cir. 1988).

⁹⁰ 41 U.S.C. § 15 (1982). "No [government] contract . . . shall be transferred . . . to any other party, and any such transfer shall cause the annulment of the contract . . . so far as the United States are concerned."

⁹¹ FAR 9.402-3(D)(1) provides that show cause notices should be used, if practicable. See also, *Lewis B. Udis v. United States*, 7 Cl. Ct. 379 (1985).

when considering the termination procedures to use with a financially distressed contractor.⁹²

The Prohibition Against Discrimination

Section 525(a) of the Bankruptcy Code⁹³ provides that:

[A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, . . . deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title . . .

One of the purposes of the Bankruptcy Code is to rehabilitate the debtor by providing a fresh start. This provision furthers that purpose by prohibiting discrimination against individuals and businesses because of a current or previous petition in bankruptcy. While its literal terms do not include the award of government contracts, it has been construed liberally and has been held to apply to the exercise of options⁹⁴ and to responsibility determinations.⁹⁵ Violation of this provision has been found because a refusal to award the contract or exercise the option was based upon the business's earlier filing of bankruptcy.

Although this provision seems to require the government to take unnecessary risks in the award of its contracts, it is consistent with the FAR guidance pertaining to responsibility determinations. The statute prohibits discrimination against a business because of a past act of filing for bankruptcy protection. The FAR requires responsibility determinations to be based upon the bidder's present ability to perform. It lists numerous criteria to be considered in determining responsibility.⁹⁶ The bidder's current financial status is relevant. Its previous filing for bankruptcy or current involvement in bankruptcy proceedings is not.

Therefore, the contracting officer who seizes upon a bankruptcy as a short-cut to a nonresponsibility determination has not only failed to follow the FAR, he or she has also presented the bidder with an easily proved case of discrimination. Contract attorneys should ensure that a

finding of nonresponsibility involving a currently or previously bankrupt bidder is thoroughly documented in terms reflecting the FAR criteria.

Bankruptcy Claims vs. Contract Claims

When a government contractor files a bankruptcy petition, the government receives notice and an opportunity to file a proof of claim with the bankruptcy court.⁹⁷ If a claim is not filed, it is forfeited. Therefore, it is critical that contract attorneys understand the difference between claims recoverable under the Contract Disputes Act and claims as defined by the Bankruptcy Code.

The Contract Disputes Act establishes procedural requirements intended to encourage settlement of contract claims. It does not define what a claim is, but provides only that any claim against the contractor shall be the subject of a decision by the contracting officer.⁹⁸ Thus, in the context of contract disputes, the government is prevented from taking action to recover a government claim until the contracting officer has rendered a final decision.

In contrast, the intent of Bankruptcy Code is to surface all possible claims for disposition in the bankruptcy proceedings. It defines a claim as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured."⁹⁹

Earlier this year, the Court of Appeals for the Third Circuit resolved the tension between these statutes in *In Re Remington Rand* by deciding that the Bankruptcy Code definition controlled the filing of proofs of claims by the government.¹⁰⁰ In other words, filing of a proof of claim in a bankruptcy case does not require a final decision by the contracting officer. Failure to file it will result in the discharge of the claim upon the confirmation of the contractor's reorganization plan.¹⁰¹ MAJ Ackley.

⁹² This consideration would be applicable only to a termination for failure to make timely delivery under (a)(1)(i) of the Default Clause because the show cause notice is optional. FAR 49.402-3(e)(1) (show cause notices should be used if practicable). Cure notices are required for terminations under (a)(1)(ii) (failure to make progress) and (a)(1)(iii) (failure to comply with other terms and conditions). FAR 49.402-3(c) and (d). Precipitating the bankruptcy petition is an unavoidable risk under these circumstances. While the potential for bankruptcy problems is a factor which, in my opinion, could be legitimately considered in the deciding whether to use a show cause notice, it should not be a primary factor in the termination decision. The termination decision is a discretionary act which can be challenged on the basis of abuse of discretion. The decision to terminate must be based upon the factors listed in FAR 49.402-3(f). See *Darwin Construction Company, Inc.* 811 F.2d 593 (Fed. Cir. 1987).

⁹³ 11 U.S.C. § 525(a) (Supp. IV 1986).

⁹⁴ *In Re Exquisito Services, Inc.*, 823 F.2d 151 (5th Cir. 1987).

⁹⁵ *In Re Coleman American Moving Services, Inc.*, 8 B.R. 379 (1980). See also, *Matter of Son-Shine Grading*, 27 B.R. 693 (1983) (removal of a bidder from the North Carolina list of prequalified bidders).

⁹⁶ FAR 9.104-1.

⁹⁷ See Army Reg. 37-103, *Disbursing Operations for Finance and Accounting Offices*, Ch. 13 (4 Dec. 1987) for reporting requirements and procedures for filing proofs of claims.

⁹⁸ 41 U.S.C. § 605(a) (1982).

⁹⁹ 11 U.S.C. § 101(4) (1982).

¹⁰⁰ *In Re Remington Rand Corporation*, 836 F.2d 825 (3d Cir. 1988).

¹⁰¹ 11 U.S.C. § 1141 (Supp. IV 1986).

Legal Assistance Items

The following articles include both those geared to legal assistance officers and those designed to alert soldiers to legal assistance problems. Judge advocates are encouraged to adapt appropriate articles for inclusion in local post publications and to forward any original articles to The Judge Advocate General's School, JAGS-ADA-LA, Charlottesville, VA 22903-1781, for possible publication in *The Army Lawyer*.

Consumer Law Note

Creditors Made Subject to Credit Reporting Requirements

The Federal Fair Credit Reporting Act, 15 U.S.C. § 1681 (1982), governs the circumstances in which a consumer reporting agency (CRA), which collects credit repayment information from creditors, can report this information to third parties. The federal statute and many related state statutes provide the consumer with remedies when a CRA releases erroneous or obsolete information. These laws do not, however, provide any remedy when a creditor provides erroneous information to the CRA. Furthermore, consumers are often not aware that a negative report has been made, so they take no action to correct the report until they are unexpectedly denied credit. While the consumer can then request that the adverse report be reinvestigated, corrected, and, under some circumstances, reissued to the denying creditor, (15 U.S.C. § 1681i(a) and (d)), there is often insufficient time to resolve the discrepancy at this point in the credit transaction.

Utah has recently resolved a portion of this problem by requiring creditors to notify consumers within 30 days when they submit negative reports to CRA's. Utah Code Ann. § 70C-7-107 (1988). Consumers will then have an opportunity to contact the CRA, request reinvestigation, and have a rebuttal statement included with the report if inaccuracies are not resolved. Because this is a problem of which consumer advocates have long complained, legal assistance attorneys may see similar protective legislation passed in other states.

Tax Notes

Air Force Officer Loses Tax Court Case

An Air Force officer recently received a lesson in what types of issues not to contest before the Tax Court. *Willie C. Register*, 88,390 T.C.M. (P-H) (1988). The officer set the stage for the appeal by failing to file federal income tax returns for tax years 1979, 1980, and 1981. The Internal Revenue Service (IRS) assessed a tax deficiency for all three years and the petitioner, representing himself in the Tax Court, contested the IRS's decision to disallow several deductions.

Many of the controversies concerned a number of partnership losses petitioner had claimed. Among other things, petitioner claimed that he had formed a partnership to publish a magazine, offering into evidence a copy of the magazine to support the assertion. The magazine indicated, however, that the publishing entity was a corporation and not a partnership. The court further found that the petitioner's Schedule K-1's (partnership tax returns) did not

credibly establish the losses and were inconsistent with his testimony.

The officer also claimed partnership losses attributable to a janitorial service. He failed, however, to produce any books or records of the partnership and could not produce partnership tax returns for 1977 and 1978, the years in which the partnership allegedly was formed and operating. Furthermore, he could not establish the amount of his capital contributions to the partnership. This evidence was critical because a partner may deduct his distributive share of partnership losses only to the extent of the adjusted basis of his interest in the partnership. I.R.C. § 704(d) (West Supp. 1988). The Tax Court was therefore unable to determine the petitioner's basis in the partnership and consequently denied the claimed losses.

The petitioner also claimed losses for two other partnerships. The petitioner relied on Schedule K-1's to substantiate his contributions and losses, but they were found unreliable by the Tax Court because they were prepared expressly for use in the case. Accordingly, the Tax Court also disallowed these partnership losses.

The petitioner additionally claimed a loss that he incurred on the sale of residential rental property. Under the code, the loss from the sale of the property is the excess of the adjusted basis over the amount realized. I.R.C. § 1001 (West Supp. 1988). The Tax Court was unable to determine the loss, however, because the petitioner failed to show the sales price of the property, or the adjusted basis in the property.

The petitioner also had difficulty substantiating deductions claimed for various business, charitable, and medical transportation expenses. A taxpayer is not entitled to deduct expenses for which he has been or could have been reimbursed. I.R.C. § 162 (West Supp. 1988). Moreover, in order to deduct unreimbursed travel expenses a taxpayer must comply with the substantiation requirements of section 274 of the code. This section requires taxpayers to substantiate with adequate records the amount of the expense, the time and place of the travel, the business purpose of the travel, and the business relationship to the taxpayer of persons entertained. I.R.C. § 274(d) (West Supp. 1988). See also Treas. Reg. § 1.2274-5(c).

The Tax Court relied on these principles to deny virtually all of the petitioners claimed deductions for business travel and entertainment expenses. The deductions claimed by the petitioner for a temporary duty (TDY) trip from his place of duty in Memphis, Tennessee, to Lackland Air Force Base were disallowed because the evidence showed that he had received complete reimbursement for the expenses from the government. The court also denied expenses claimed for several recruiting trips because the petitioner was unable to explain why the expenses were not reimbursed by the government.

The Tax Court disallowed a mileage deduction for miles driven for charitable and medical purposes because the petitioner could not find his calendar or log for the years in question. Although the court noted that the petitioner need not meet the strict substantiation requirements of section 274 to establish travel expenses for charitable or medical expenses, it nevertheless denied these claimed expenses because the petitioner failed to meet his burden of proving

that he was entitled to the deduction and the amount of the deduction. Treas. Reg. § 1.170A-1(g).

The final issue litigated in the case, the propriety of several claimed moving expenses, was also decided against the petitioner. The petitioner initially claimed as a moving expense the cost of his wife's airline tickets to George Air Force Base in California. The Tax Court denied the claim because the evidence showed that petitioner was at George Air Force Base for only two months prior to his change of station to Korea. Under the Code, a deduction for moving expenses is allowed only if both the former residence and the new residence were the taxpayer's principal places of abode. I.R.C. § 217(a) (West Supp. 1988). The petitioner failed to show that he and his wife established a residence at George Air Force Base during his temporary two months of duty.

The petitioner also claimed moving expenses incurred in moving his family to Korea, where petitioner was assigned for a one-year tour of duty. The evidence showed that petitioner lived in Korea alone from September through June of the following year. In June, after the children completed school in the United States, petitioner's wife and children joined him in Korea, leaving in August to return for the fall school term. According to the court, which denied petitioner's claimed moving expense adjustment, this evidence showed that the travel was really a vacation, and not for the family to establish a new principal residence in Korea.

The Tax Court added to the petitioner's misery by imposing a penalty for failing to show that his failure to file tax returns for the three years was reasonable and not the result of willful neglect. See I.R.C. § 6653(a) (West Supp. 1988). The court also sustained a penalty imposed on the practitioner for failure to pay estimated income taxes. I.R.C. § 6654(a) (West Supp. 1988).

This case contains several lessons for taxpayers considering challenging the IRS in the Tax Court. First, the petitioner in this case probably would have benefited from the assistance of an attorney; he lost a great deal of credibility with the court by introducing inconsistent evidence. In addition, by contesting several weak issues, the petitioner diminished his chances of winning the closer issues. Moreover, this case highlights the extreme importance of maintaining adequate records relating to itemized deductions. As the petitioner learned, it is futile to battle the IRS regarding the propriety of a claimed deduction using self-serving or incomplete substantiating records. The final painful lesson learned in this case is that taxpayers are likely to pay a heavy financial penalty for disregarding the IRS's rules and regulations. MAJ Ingold.

Sixth Circuit Upholds Collateral Attack on Divorce Decree

The Sixth Circuit has decided that a party can challenge the characterization of payments in a divorce decree as being a nontaxable property distributions. *Green v. Commissioner*, 855 F.2d 279 (6th Cir. 1988). The parties in *Green* were married for 17 years and had two children before receiving a divorce from a Kentucky state court. The court ordered the husband, Larry, to pay his wife, Shirley, \$72,500 as her share of marital property. This amount was to be paid at the rate of \$700.00 per month. In making this award, which was well over the parties' net worth, the court considered Shirley's contributions as homemaker and as the sole wage earner in the family while Larry went to medical school.

Larry treated his payments to his ex-wife as alimony on his tax returns. Shirley did not, however, report these payments as income on her returns. The Internal Revenue Service (IRS) issued deficiency notices to both Shirley and Larry. The taxpayers then petitioned the Tax Court to determine the correct characterization of these payments.

The Tax Court found that the state court decree was ambiguous as to whether the payments were for support or constituted a division of marital property. The Tax Court reasoned that more than 80% of the payments were intended for support, relying on the fact that the total award far exceeded the parties' net worth and the fact that Kentucky law does not view professional degrees as marital property. Accordingly, the court upheld the deficiency against Shirley and she appealed to the Sixth Circuit.

Shirley first argued that the plain language of the divorce decree should not be subject to attack absent evidence of fraud, collusion, or mistake. She relied on an earlier case, *Schatten v. United States*, 746 F.2d 319 (6th Cir. 1984), which barred a collateral attack against a divorce settlement. The court in *Green* refused to extend this bar to the court-ordered divorce decrees with which it was faced. The court noted that in the case of settlement agreements, the tax consequences of the distributions are a matter of agreement between the parties; to allow collateral attack would allow one party to unilaterally change the bargain. On the contrary, court-ordered divorce decrees are not the result of bargaining between the parties and therefore, a collateral challenge would not, in effect, permit one party to unilaterally change the bargain.

The Sixth Circuit then considered the substantive issue of whether the payments should be construed as alimony or as a marital property division. According to the court, the divorce decree clearly and consistently referred to the award as marital property and not as support or alimony. The Sixth Circuit therefore found that the Tax Court erred in finding the divorce decree ambiguous and in concluding that at least some portion of the award represented alimony payments. MAJ Ingold.

Claims Report

United States Army Claims Service

Management Strategies for the New Claims Judge Advocate

Captain Sharon K. MacKenzie
Claims Judge Advocate, Fort Jackson, South Carolina

Introduction

The purpose of this article is to provide a practical approach to meeting some of the initial challenges a newly-assigned claims judge advocate (CJA) or claims attorney faces. Managing any group requires knowledge of the jobs of subordinates and the CJA's first challenge is to keep the Claims Branch running smoothly while learning about its operation. Upon taking charge, the CJA should immediately become familiar with Army Regulations (AR's) 27-20, 27-40 and the U.S. Army Claims Service (USARCS) Manual, because they are used on a daily basis. The CJA may also want to begin assessing the claims office structure and personnel. This assessment will be the basis for taking initial corrective action to deal with the urgent problems as well as developing an agenda that the CJA can implement later. The CJA may also consider making the basic contacts and time management decisions which are sometimes delayed in the press of keeping up with day-to-day duties. These include organizing activities as a Medical and Dental Activity (MEDDAC) advisor, contacting the United States Army Claims Service (USARCS) attorney who is responsible for the CJA's office and the United States Attorney's office, and ensuring that computers are used to reduce the time required to produce correspondence and reports and manage data.

Assessing the Claims Office

The quickest way to get an overall picture of the Claims Office is to review the Claims Standard Operating Procedure (SOP). A well-written SOP will show the CJA how employees put AR 27-20, AR 27-40, and USARCS policy into practice as well as the tasks for which each employee is responsible. The SOP should list the major responsibilities of each member of the staff and the procedures and forms used for processing each type of claim adjudicated or asserted. The CJA can also use the SOP as a quick refresher course on the various claims received at a claims office, particularly the numerous personnel and affirmative claims that must be processed daily. Many of the claims received at a claims office will be personnel claims which should be adjudicated as quickly as possible to relieve the hardship the claimant is suffering from personal property losses. To ensure that personnel claims are expeditiously handled, the CJA should not only fully understand personnel claims policy but also be certain the SOP is clear and correctly written.

The CJA can ensure the SOP is thorough and understandable by getting claims office personnel involved in revising the SOP. The CJA should ask each employee to review the SOP and propose revisions. Some employees may not even know an SOP exists. When the employee has completed the review and revision, ask each employee to

explain what he or she does and why the SOP should be changed. Job performance standards often refer to time processing limits cited in the SOP. In such cases, having the employee review the SOP assures the CJA that the employee knows specified time limits and other requirements. The CJA should focus on understanding how the employee handles the work flow and discovering any hidden frustrations the employee has about the job. For example, a claims adjudicator, whose performance standards specify a particular number of days to adjudicate personnel claims, may be frustrated because he or she is not getting the claims files quickly enough from the claims clerk who initially receives claims. Meanwhile, the claims clerk may have been told to immediately log in the claim and give it to the adjudicator, but only after all pertinent documents are in the claims file. Obviously there will be times when neither the claims clerk nor the claims adjudicator can comply with time requirements and both are left frustrated with the procedures and each other. Simple changes may eliminate the source of the problem. The claims clerk, for example, could log in the claim, make the initial calls necessary to obtain the missing paperwork, and immediately give the claim to the claims adjudicator who is thereafter responsible for getting the needed documents.

During the discussion with the employee, the CJA may also find that there are competence problems for which training should be immediately planned. Ultimately, of course, a yearly training plan for each employee must be established. Once the review of the SOP is complete, the CJA should normally work with the existing claims office structure for at least three to six months before making major changes in employee assignments.

Advising Medical and Dental Activities (MEDDAC)

It is important that the CJA be organized because as much as fifty percent of the work time will be in the Risk Management (RM) area investigating and researching medical malpractice claims and potentially compensable events (PCE's). The CJA, who is asked to be the legal representative for various hospital committees other than the RM committee, should always consider whether the committee membership presents a conflict of interest with his RM duties. The CJA investigation of actual and potential claims involves frequent and candid discussions with physicians. A CJA can hardly expect to obtain candid information from physicians who know the CJA may use the information against them in the Credentials Committee (see *Advising the Hospital Commander*, The Army Lawyer, Jan. 1987, at 47). Basically, Medical and Dental Activity Commanders need three things from their legal advisor: (1) briefings on malpractice claims and PCE's, (2) a legal advisor on the RM

committee, and (3) education on medicolegal matters for medical personnel.

Upon taking charge of the claims office, the CJA should immediately set up monthly meetings with the hospital commander during which the CJA provides written lists of medical malpractice claims and PCE's. Written reports are necessary, not only to keep the commander informed, but to meet the requirements of the Joint Commission on Accreditation of Health Care Organizations (JCAHO). The commander of the Dental Activity may not require *monthly* briefings, but the CJA should nevertheless initiate contact and schedule meetings as needed. During one of the initial meetings with the commander, the CJA should discuss and document the respective duties of the Office of the Staff Judge Advocate (OSJA) and medical and dental activities concerning the investigation and reporting of malpractice claims and PCE's as well as measures to preserve evidence. Depending on the installation, this may take the form of a Memorandum of Understanding (MOU) or a local regulation. Whatever the case, the duties should be in writing because it is important that all involved with claims reporting and investigation are aware of their responsibilities in order to avoid misunderstandings and the loss of medical records and other evidence. Concerns to be addressed in the local regulation or MOU include how medical records and physical evidence are secured and preserved, where, when and by whom medical personnel are interviewed, and who is the primary point of contact for claims, PCE's, and lawsuits. Even though the Commander may not be the primary point of contact, he should be immediately notified when a medical malpractice lawsuit or claim is filed. If the CJA wants to create or revise an MOU, a draft should be submitted to the SJA for initial approval, then routed through the Deputy Commander for Clinical Services (DCCS) and the Deputy Commander for Administration (DCA) to the Hospital Commander. Revision of a local regulation generally requires the same procedure.

The CJA should be familiar with RM program standards. The standards are found in AR 40-66. The CJA should read Chapter Nine of this regulation in anticipation of the first RM meeting. The Chairperson of the RM committee will expect the CJA to have a general knowledge of health care law. Questions concerning documentation, legibility, confidentiality and discoverability of health records frequently arise. During the RM committee meetings, the CJA should be prepared to discuss each claim and its status, such as whether additional investigation is needed or the claim has been settled or denied.

A Commander's Deskbook and periodic legal/medical seminars are important educational services the CJA can provide. A Deskbook covering topics such as the local law on contributory negligence of patients, informed consent, damages for personal injury and wrongful death, and proximate cause is essential because it provides a starting point for educating the Commander. The CJA should give the Commander a copy of the deskbook and keep a copy in the Claims Office for ready reference when medical personnel seek advice. Claims under the Federal Tort Claims Act involve application of local law. This must be stressed in the Deskbook as MEDDAC Commanders and other medical personnel may not be aware that legal requirements at your post may differ from previous posts. The Deskbook will also be invaluable to the CJA in establishing the rationale for settling claims locally and in preparing recommendations

for USARCS. During legal/medical educational seminars, the CJA may want to review the reasons why locally-generated malpractice claims were paid or denied in order to give medical personnel a clear picture of how their medical care impacted on the results of a claim. Before beginning a seminar, the CJA should come to an agreement with the Commander about how much information concerning specific claims arising locally should be disseminated. The CJA should consider conducting medicolegal seminars on a regular basis, perhaps every quarter, and open the seminars to all medical personnel.

Coordination with USARCS and the U.S. Attorney's Office

As soon as possible, the CJA should review all tort claims, develop a priority for approaching the caseload, and call the USARCS attorney responsible for the CJA's office to review the status of the claims. The USARCS attorney is a valuable source of information concerning how to proceed in a claims investigation and can give the CJA advice on various legal issues encountered while investigating a claim. The USARCS attorney is the CJA's main advisor on day-to-day questions arising from claims investigations and should be kept informed of all developments. The CJA should also visit the U.S. Attorney's office and contact the Assistant U.S. Attorney (AUSA) in charge of the torts section. The AUSA may be helpful in giving specific guidance before final action is taken on a claim.

Efficient use of Claims Computers

The claims office word processing system can be used to move paperwork quickly. A form letter system will allow claims personnel to keep basic parts of a letter or document in the word processing system to be retrieved for insertions as appropriate and then printed. The CJA may find that the office is already using form letters created for most routine claims correspondence. If not, the CJA can obtain examples of form letters by sending a formatted disk (IBM format) to U.S. Army Training Center and Fort Jackson, Office of the Staff Judge Advocate, ATTN: Claims Branch, Fort Jackson, South Carolina 29207. All form claims letters will be copied to the disk and returned.

The form letters have been created with Enable software. If you operate under a different word processor, please indicate and ASCII files will be provided. The letters include everything from the attorney agreement letter used in medical care recovery claims to unearned freight letters. Word processing and data base programs can also be used to produce payment and deposit vouchers, weekly reports, and affirmative claims logs.

Conclusion

The CJA has the continuing responsibility of improving the Claims Branch. To make sound decisions the CJA must have all the facts concerning claims personnel and resources. Employees should be consulted about developing a system to solve problems and improve the claims operation because the person doing the job often knows the most about problems associated with changes. Initial decisions to solve minor problems have to be made, but major changes should normally wait until the CJA has had time to become thoroughly acquainted with the office structure.

Claims Notes

Personnel Claims Notes

Receipt and Transfer of Personnel Claims

A number of field claims offices still appear to misunderstand the clear intent of AR 27-20 that personnel claims will be logged in when received, rather than returned to the claimant for more documentation, and will not be transferred to other claims offices without authority.

When a claims office receives documents constituting a claim, such as claims forms, that office will log and date stamp the claim and process it. A written demand for compensation signed by the claimant constitutes a claim, even if no substantiation is included. Pursuant to paragraph 11-7, AR 27-20, a demand for compensation cognizable under the Personnel Claims Act need not even be for a sum certain. It is highly inappropriate to return a claim which is not fully documented in order to achieve misleading processing times. It is even more inappropriate to return a claim with the suggestion that the claimant resubmit it to another claims office.

A claimant who does not provide complete documentation should be advised of this in writing and told what documents to provide. He or she should also be informed that the claim will be processed as is if the required paperwork is not submitted within a specified time (normally 10 or 15 days). In the automated database, such a claim is "awaiting documentation." If no communication is received within the time specified, the claim should be processed for payment to the extent it is substantiated, or denied if no amount is substantiated and/or meritorious. It should not be "abandoned."

Paragraph 11-9c, AR 27-20, states that a personnel claim "will not be transferred to another Army claims office

except as authorized by USARCS or a command claims service." A personnel claim may be transferred to a higher settlement authority for action when appropriate, accompanied by a seven-paragraph memorandum of opinion. A claim which is not meritorious as a personnel claim, but is cognizable as a tort claim, may be converted to a tort claim and transferred to the office having jurisdiction over the area in which the claim arose. Finally, a personnel claim may be transferred with the permission of USARCS or a command claims service when another office is better situated to resolve the claim. Such a claim will be accompanied by a cover letter prepared in accordance with Personnel Claims Bulletin 14. A personnel claim will not otherwise be transferred. Any claim transferred will include a diskette with information on that claim, without exception. As Personnel Claims Bulletin 14 indicates, the mere fact that a personnel claim arose in another claims office's geographic area of tort claims responsibility is not a basis for transfer.

Any office receiving a personnel claim improperly transferred should contact USARCS so that corrective action can be taken. (Mr. Frezza)

Matching Discontinued China and Crystal (2)

Pieces of china and crystal from discontinued patterns are often broken in shipment and, as stated in our July 1988 Personnel Claims Note, claimants should be directed to firms that can replace such pieces. Walter Drake China Exchange, 5200 Drake Building, Colorado Springs, CO 80940, specializes in replacing Aynsley, Lenox, Spode, Castleton, Minton, Syracuse, Franciscan, Noritake, Wedgwood, Haviland, and Royal Doulton china. Our thanks to Bobbie Gunter at Fort Ritchie for providing this information.

Personnel, Plans and Training Office Note

The fiscal year 1989 JAGC selection boards are scheduled as follows:

<i>Board</i>	<i>Dates</i>
Command & Staff College Advisory	11 Oct. 88
Conditional Vol. Indef./Vol. Indef.	18 Oct. 88
Graduate Course	22 Nov. 88

Lieutenant Colonel and Captain
Funded Legal Education Program
JAGC Accessions
Colonel and Captain
Major
Senior Service College and Captain

6-9 Dec. 88
8 Dec. 88
TBD Dec. 88
31 Jan.-3 Feb. 89
14-16 Mar. 89
8-9 Aug. 89

Guard and Reserve Affairs Items

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

Reserve Component Promotions Update

Dr. Mark Foley, Ed.D.

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

Reserve Component Selection Board Convenes

A selection board will convene on 28 February 1989 in St. Louis to consider USAR and NG captains for reserve promotion to major. The zone of consideration will include all reserve captains on the Army Promotion List (APL) who have dates of rank of 16 May 1983 and earlier, and have either a minimum of 12 years of commissioned service or who are at least 37 years old.

Records and documents to be reviewed by the board will include an officer's Official Military Personnel File (OMPF), Officer Record Brief (ORB) or DA Form 2-1, and photograph. The promotion board will use the "fully qualified" (no quota) method of selection.

Officer Evaluation Reports (OER's) must be submitted in time to arrive at ARPERCEN (ATTN: DARP-PRE-O) by 28 February 1989. Code 11 OER's are mandatory for most NG, AGR, and USAR Troop Program Unit (TPU) officers who were passed over for promotion by the 1988 APL Reserve Majors Board that adjourned 5 May 1988. Captains who have received an OER or Academic Report with a through date of 2 August 1988 or later are not eligible for this type of report. Code 21 "complete-the-record" OER's are optional for AGR and NG officers who meet the requirements of paragraphs 5-21 and 8-24 of AR 623-105 (OER System). A list of codes used as reasons for submitting evaluation can be found in Appendix K, AR 623-105. The required through date for Code 21 and Code 11 reports is 1 December 1988. The minimum rating period requirement for NG and USAR/TPU officers is 120 days. The minimum for AGR's is 90 days.

Officers who are in the zone of consideration may submit a letter to the board regarding matters they feel are important in the consideration of their record. Letters should be sent to: President, 1989 Major APL Promotion Board, ATTN: DAPC-MSL, 9700 Page Boulevard, St. Louis, MO 63132-5200. Letters read by a promotion board will become a matter of record for that board. They will be maintained by the U.S. Total Army Personnel Agency (TAPA), but they will not be placed in an officer's official file. Letters of recommendation from other parties sent directly to the board, or letters that reflect on the character, motives, or conduct of other people, will not be presented to the selection board. Letters of recommendation may be submitted if they are attached to your own letter to the board.

Physical examinations must be current for an officer to be promoted. If a physical will be more than four years old before your promotion eligibility date, you should schedule a new physical early to ensure that you can get it recorded in your file. The Army will not issue promotion orders if an officer's physical is out of date.

Officers who are in the zone of consideration will be sent a copy of their official file for review. Missing documents, corrections, or additions to the file should be submitted to the 1989 Major APL Promotion Board, ATTN: DAPC-MSL, 9700 Page Boulevard, St. Louis, MO 63132-5200. For additional assistance, contact your ARPERCEN PMO, MAJ Kellum or CPT Conrad (800-325-4916).

Promotion Consideration File (PCF)

The PCF is prepared by TAPA for use by the Reserve Component selection boards. It should contain the following:

1. All rendered academic and performance evaluation reports.
2. An Officer Record Brief or DA Form 2-1 (Personnel Qualification Record). Entries pertaining to personal data, military and civilian education, and duty assignment history are required.
3. A photograph taken within the past three years. Height and weight data and signature should be entered on the reverse side of the photograph per AR 135-155, paragraph 3-3a(4).
4. The officer's letter to the board president, if provided.

A summary of the contents is set forth in the table below.

Data for compiling the PCF is available from the OMPF and the Career Management Individual File maintained at ARPERCEN. When not found there, it may be available at the unit/field file or in the individual's personal records.

Officers in the zone of consideration are responsible for the following:

1. Reviewing their OMPF and providing ARPERCEN a copy of any documents missing from the file.
2. Auditing their DA Form 2-1, when requested by the unit personnel clerk.
3. Ensuring they have a current photograph on file at ARPERCEN.
4. Taking a physical every 4 years IAW AR 40-501. If overweight, ensuring their status in the weight control program is reported to ARPERCEN IAW AR 600-9, paragraph 211. Promotion orders will not be issued to an officer whose physical is out of date or who is overweight.
5. Following up with unit support personnel to ensure that evaluation reports, the DA Form 2-1, and other relevant information gets submitted to ARPERCEN in time to be presented to the board.

6. Ensuring they have a current address on file at ARPERCEN.

Contents of PCF

	IRR/IMA	AGR	TPU	DC	NG	Remarks
OMPF-P-Fiche	X	X	X	X	X	1,7
2-1			X		X	2
ORB	X	X		X		3
Photo	X	X	X	X	X	4
Letter to the Board President	X	X	X	X	X	5
Loose Papers	X	X	X	X	X	6

Notes:

1. Provided by U.S. Army Reserve Personnel Center (ARPERCEN)/National Guard Records Services Division, as appropriate.
2. Provided by the officer's servicing personnel/administrative section.
3. Provided by an ARPERCEN personnel management officer. If Dual Component, provided by ARPERCEN.
4. To be provided by the officer for the board's use or by the personnel management officer (PMO) if a current copy is available in the career management file. The photo must be current within three years.
5. Optional.
6. Includes Official Military Personnel File (OMPF) documents received too late to be added to the OMPF (Performance-Fiche).
7. OMPF performance documents required to be included in the PCF include (listed in order of precedence):
 - Academic Evaluation Reports.
 - Officer Evaluation Reports.
 - Letter Reports.
 - Resident and nonresident course completion certificates.
 - Article 15's.
 - Letters of reprimand.
 - Unfavorable information submitted in accordance with AR 600-37.
 - Award Orders.
 - Letters of appreciation/commendation.

Letter to the Board

Normally, there is no purpose served by writing to the board. The OMPF, if properly maintained, adequately documents your career achievements and potential for promotion board consideration. In many cases, a soldier's letter tends to detract from the file because of irrelevancy, poor grammar and spelling, too many superfluous enclosures, and sloppy preparation.

If you decide to write, your letter should provide information not already contained in the OMPF, be short (one page maximum), relevant, free of punctuation and spelling errors, signed, and dated. The letter should be a crisp, professional document in appearance, style, and content.

Items such as the following make good enclosures to your letter and attest to your good judgment: current photo; OER's missing from OMPF; letters of appreciation/commendation not in OMPF; newly acquired diplomas, degrees, and items pertaining to professional stature; information concerning civilian skills that validate qualifications in a comparable military skill; and statement addressing status in weight control program, if appropriate. All enclosures should be referenced in the letter.

The following enclosures are normally irrelevant and tend to detract from your letter: TDA extracts; oath of office; sick call slip; DD Form 149 (Request for Correction to Military Records); DA Form 1379 (USAR Record of Reserve Training); application for correspondence course enrollment; subcourse completion certificates; subcourse completion grades; individual reassignment orders; ADT/ADSW orders; promotion/appointment orders; physical examination/panoramic dental x-rays; DA Form 635 (Recommendation for Award); correspondence downgrading a proposed award; DA Form 873 (certificate of

clearance); curriculum for USARF School course; APFT score sheets; pay vouchers; retirement point sheets; DA Form 1380 (Record of Individual Performance of Reserve Duty Training); results of AGR continuation board; DD Form 214; unit training schedule; etc.

OER's—Center of Mass Concept

OER's are obviously an important part of your PCF. One part of the OER that is not understood by everybody is the senior rater profile. The core concept of the senior rater profile is the center of mass concept. The center of mass concept establishes a consistency between the way senior raters evaluate and the way selection boards interpret the evaluation. This assists in ensuring that the message sent by the senior rater is the same as the one received by the selection board. This, in turn, provides sufficient senior rater confidence to accept the opportunity to indicate the very best and those below the standard without fear of hurting all the rest.

The value of the potential evaluation box checked in Part VII depends on the senior rater's profile. The center of mass, or the "pack", is normally the most frequently used box. The selection board is instructed to look at the box checked in relation to the "pack" (most frequently used box) and make an assessment. Is the rated officer ahead of the pack, with the pack, or behind the pack. The board members then read the narrative and move on to the next OER. The narrative is very important, but glowing words fall short if the board member has already determined that the senior rater's evaluation is behind the "pack."

What should a senior rater do if he/she determines that his/her profile is not credible? Currently there is no USAR Senior Rater Profile Restart Program as there is in the Active Component. ARPERCEN is developing the requirements for a Restart Program. Due to other priorities and constraints, implementation of the RC Restart Program has been delayed. Senior raters should not shift philosophy prior to restart of the senior rater profile. A shift in rating philosophy without benefit of a restart may not convey the intended potential evaluation to selection boards. Senior raters of USAR officers should not change their rating philosophy unless they are absolutely sure that the USAR Restart Program has been implemented, and that their profiles have been restarted.

Lieutenant Colonel Selection Board

Results of the recent Reserve Component selection board for lieutenant colonel are scheduled to be released near October 1988. The selection rate for USAR JAGC officers considered for promotion to lieutenant colonel by the 1987 selection board was 56 percent. The selection rate for those who were educationally qualified was 93 percent. Officers who have not completed at least 50 percent of Command and General Staff College will not be selected for promotion. The 1989 board will be scheduled to convene on 7 August 1989. The zone of consideration will be majors who have dates of rank of 1 January 1984 or earlier, and have either a minimum of 17 years commissioned service (including constructive credit) or are at least 42 years old.

Colonel Selection Board

The Reserve Component selection board for colonel convened on 5 October 1988. The zone of consideration is

lieutenant colonels with a date of rank of 1 January 1985 or earlier. Selection rate for USAR JAGC officers considered for promotion by the 1987 selection board was 12 percent of those fully qualified for promotion. Nonselection for colonel is not considered a pass over as it is for lieutenant colonels and below.

GRA Notes

New National Guard Representative for GRA

Lieutenant Colonel William J. Doll is the new National Guard Representative for Guard and Reserve Affairs at TJAGSA. He can be reached at (804) 972-6380.

On-Site Update

The project officer for the Louisville, Kentucky on-site is Lieutenant Colonel James H. Barr. His new address is 100 Westwind Road, Louisville, Kentucky 40207.

Active Guard/Reserve Program

Presently there are opportunities in the Active Guard/Reserve (AGR) Program for Reserve Component judge advocates to obtain full-time active duty tours. The program is available to those officers desiring only one AGR tour, as well as those desiring to make a career in the program. An AGR officer may accumulate twenty years of active federal service and qualify for active duty retirement.

There are ten AGR judge advocate positions in the Reserves and fifty-four in the National Guard. If you are a Reserve or National Guard judge advocate, or will soon be released from active duty, and would like additional information on the AGR Program, contact Lieutenant Colonel William O. Gentry (Reserve Representative to The Judge Advocate General's School) or Lieutenant Colonel William J. Doll (National Guard Representative to The Judge Advocate General's School), Judge Advocate Guard and Reserve Affairs Department, The Judge Advocate General's School, Charlottesville, VA 22903-1781, telephone (804) 972-6380, or AUTOVON 274-7110, ext. 973-6380.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. If you have not received a welcome letter or packet, you do not have a quota. Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis MO 63132 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1988

December 5-9: 4th Judge Advocate & Military Operations Seminar (5F-F47).

December 12-16: 34th Federal Labor Relations Course (5F-F22).

1989

January 9-13: 1989 Government Contract Law Symposium (5F-F11).

January 17-March 24: 118th Basic Course (5-27-C20).

January 30-February 3: 97th Senior Officers Legal Orientation (5F-F1).

February 6-10: 22d Criminal Trial Advocacy Course (5F-F32).

February 13-17: 2d Program Managers' Attorneys Course (5F-F19).

February 27-March 10: 117th Contract Attorneys Course (5F-F10).

March 13-17: 41st Law of War Workshop (5F-F42).

March 13-17: 13th Admin Law for Military Installations Course (5F-F24).

March 27-31: 24th Legal Assistance Course (5F-F23).

April 3-7: 5th Judge Advocate & Military Operations Seminar (5F-F47).

April 3-7: 4th Advanced Acquisition Course (5F-F17).

April 11-14: JA Reserve Component Workshop.

April 17-21: 98th Senior Officers Legal Orientation (5F-F1).

April 24-28: 7th Federal Litigation Course (5F-F29).

May 1-12: 118th Contract Attorneys Course (5F-F10).

May 15-19: 35th Federal Labor Relations Course (5F-F22).

May 22-26: 2d Advanced Installation Contracting Course (5F-F18).

May 22-June 9: 32d Military Judge Course (5F-F33).

June 5-9: 99th Senior Officers Legal Orientation (5F-F1).

June 12-16: 19th Staff Judge Advocate Course (5F-F52).

June 12-16: 5th SJA Spouses' Course.

June 12-16: 28th Fiscal Law Course (5F-F12).

June 19-30: JATT Team Training.

June 19-30: JAOAC (Phase II).

July 10-14: U.S. Army Claims Service Training Seminar.

July 12-14: 20th Methods of Instruction Course.

July 17-19: Professional Recruiting Training Seminar.

July 17-21: 42d Law of War Workshop (5F-F42).

July 24-August 4: 119th Contract Attorneys Course (5F-F10).

July 24-September 27: 119th Basic Course (5-27-C20).

July 31-May 18, 1990: 38th Graduate Course (5-27-C22).

August 7-11: Chief Legal NCO/Senior Court Reporter Management Course (512-71D/71E/40/50).

August 14-18: 13th Criminal Law New Developments Course, (5F-F35).

September 11-15: 75th Contract Claims, Litigation and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

February 1989

1-2: FB, Current Issues in Environmental Law, Tampa, FL.

1-3: ALIABA, Trial Evidence, Civil Practice in Federal and State Courts, Scottsdale, AZ.

2: FB, Federal Taxation of Condemnations and Installment Sales, Miami, FL.

3: FB, Beyond Word Processing—Computers, Pensacola, FL.

3: PLI, Estate and Financial Planning and Marriage, New York, NY.

6-7: PLI, 28th Annual Advanced Antitrust, Chicago, IL.

8: FB, Marketing Seminar, Miami, FL.

9: FB, Mortgage Law, Miami, FL.

9-10: ALIABA, Accountants' Liability, Washington, D.C.

9-10: FB, Basic Personal Injury Litigation, Orlando, FL.

9-10: FB, Current Trends for Corporate Counsel, Tampa, FL.

9-10: FB, Immigration Law, Miami, FL.

9-10: PLI, Problems of Indenture Trustees and Bondholders, New York, NY.

9-10: PLI, Project Financing: Power Generation, Waste Recovery, New York, NY.

10: FB, Board Certification Review, Jacksonville, FL.

10: FB, Florida Real Estate Development Law and Practice, Pensacola, FL.

10-11: UKCL, Kentucky Business Organizations, Lexington, KY.

12-16: NCDA, Trial Advocacy, New Orleans, LA.

12-17: NJC, Dispute Resolution, San Diego, CA.

13-14: PLI, Technology Licensing, San Francisco, CA.

13-17: GPC, Administration of Government Contracts, Washington, D.C.

15-17: NELI, Employment Law Litigation, San Francisco, CA.

16: FB, Bankruptcy Practice and Procedure, Orlando, FL.

16: SBN, Employment Law Seminar, Las Vegas, NV.

16-17: PLI, Current Problems in Federal Civil Practice, Chicago, IL.

16-17: PLI, Franchising 1989, New York, NY.

16-17: ABA, International Litigation, Los Angeles, CA.

16-17: ALIABA, Leases of Goods: Article 2A of the Uniform Commercial Code, Scottsdale, AZ.

16-17: PLI, Preparation of Annual Disclosure Documents, San Francisco, CA.

16-18: ALIABA, Environmental Law, Washington, DC.

19-24: NJC, Current Issues in Family Law, San Diego, CA.

22-24: SLF, Institute on Oil and Gas Law and Taxation, Dallas, TX.

22-24: ALIABA, Tax and Business Planning, New Orleans, LA.

23: FB, Federal Taxation of Condemnations and Installment Sales, Orlando, FL.

23-24: FB, Legal Exchange, Miami, FL.

23-25: ALIABA, Advanced Estate Planning Techniques, Lahaina, Maui, HI.

23-25: ALIABA, Qualified Plans, PCs, and Welfare Benefits, Scottsdale, AZ.

24: NCLE, Corporate Practice, Omaha, NE.

24: UKCL, Evidence and Trial Practice, Louisville, KY.

26-3/2: NCDA, Criminal Investigators Course, Reno, NV.

27-28: MLI, Ob/Gyn and Pediatric Injuries, Palm Springs, CA.

27-3/3: ESI, Federal Contracting Basics, San Francisco, CA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1988 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

<i>Jurisdiction</i>	<i>Reporting Month</i>
Alabama	31 December annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years beginning in 1989
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually beginning in 1989
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually
Montana	1 April annually
Nevada	15 January annually
New Mexico	1 January annually or 1 year after admission to Bar
North Carolina	12 hours annually
North Dakota	1 February in three-year intervals
Oklahoma	1 April annually
Oregon	Beginning 1 January 1988 in three-year intervals
South Carolina	10 January annually
Tennessee	31 January annually
Texas*	Birth month annually

*In 1988, the State of Texas imposed an occupation tax of \$110.00 on all attorneys licensed to practice law in Texas, regardless of whether the attorney was in private practice or resided in Texas. The Office of the Staff Judge Advocate at Fifth Army has learned that a request for refund may be submitted to the Comptroller's Office, State of Texas. Although there is no general policy that would exempt all military or federal civilian attorneys, each request will be considered on a case-by-case basis. The request should include the fact that the attorney is precluded from engaging in the private practice of law. Requests should be sent to Mr. Bob Bullock, Comptroller of Public Accounts, Capital Station, Austin, Texas 78774; telephone 1-800-531-5441, extension 34620/34087 (outside and within the State of Texas.)

Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For addresses and detailed information, see the July 1988 issue of The Army Lawyer.

5. 1988-1989 USAREUR OJA Continuing Legal Education Program

The Continuing Legal Education Program (CLE) offered by the Office of the Judge Advocate (OJA), USAREUR, is designed to educate Judge Advocate Legal Services (JALS) attorneys new to USAREUR about unique aspects of practicing military law overseas and to assist JALS attorneys already in theater to remain abreast of current legal developments.

USAREUR Regulation 27-6, Training Judge Advocate Legal Services Personnel, was promulgated 30 August 1988 to further formalize the OJA CLE program and to emphasize the importance of providing recurring training to attorneys on USAREUR-unique legal issues. Through USAREUR Reg 27-6, a command-approved, comprehensive CLE program is mandated. USAREUR Reg 27-6 provides that each JALS attorney within USAREUR will receive at least 15 hours of USAREUR OJA-sponsored CLE training each calendar year.

In accomplishing this objective, the USAREUR CLE program also assists the nearly 400 uniformed and civilian lawyers within USAREUR to comply with growing state mandatory CLE requirements. Thirty states currently have a mandatory CLE requirement. Because of the differing policies among the states which have mandatory requirements, JAGC Personnel Policies Pamphlet, paragraph 7-11c (OCT 88), provides that meeting these annual CLE requirements is the responsibility of the individual judge advocate. The USAREUR OJA CLE program permits JALS attorneys within USAREUR to receive quality CLE training without the expense of time and money involved in returning to the US for CLE credit.

Under USAREUR Reg 27-6, each substantive law division in OJA manages the training within its respective area. Each course offered is tailored to the relative experience level of attorneys who will be attending and is influenced by input received from attorneys in the field on instruction they need to better perform their jobs. Instruction is drawn from The Judge Advocate General's School subject matter experts, from subject matter experts within each OJA substantive law division, from resources such as the Trial Counsel Assistance Program, the US Army Legal Services Agency, and resources in USAREUR.

To monitor the USAREUR CLE program, the USAREUR Judge Advocate has formed a Standing Committee on Continuing Legal Education. Committee

members are all former TJAGSA faculty members stationed in Europe. The committee will review the USAREUR CLE program, advise the Judge Advocate as to its content, and make suggestions for its improvement.

Following is a list of the 1988-89 CLE programs.

USAREUR Judge Advocate's Continuing Legal Education Program, FY 89

November 88

2-4—Contract Law Nonappropriated Fund Continuing Legal Education (Heidelberg)

21-23—Judge Advocate's Management Continuing Legal Education (Berchtesgaden)

December 88

5-9—Claims Service Continuing Legal Education (Mannheim)

13-16—International Law Continuing Legal Education (Berchtesgaden)

January 89

9-13—Legal Assistance Income Tax Continuing Legal Education (Ramstein)

17-20—Administrative Law Continuing Legal Education (Heidelberg)

March 89

13-17—Contract Law Continuing Legal Education (Heidelberg)

April 89

20-21—Staff Judge Advocates Continuing Legal Education (Heidelberg)

May 89

11-12—International Law Trial Observers Continuing Legal Education (Heidelberg)

23-26—International Law Operational Law Continuing Legal Education (Heidelberg)

August 89

4—Branch Office—Command Judge Advocate Continuing Legal Education (Heidelberg)

18—Contract Law Procurement Fraud Advisors Legal Education (Heidelberg)

24-25—Staff Judge Advocates Continuing Legal Education (Heidelberg)

September 89

5-8—Legal Assistance Continuing Legal Education (Garmisch)

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*.

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

- | | |
|------------|---|
| AD B112101 | Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-87-1 (302 pgs). |
| AD B112163 | Contract Law, Government Contract Law Deskbook Vol 2/JAGS-ADK-87-2 (214 pgs). |
| AD B100234 | Fiscal Law Deskbook/JAGS-ADK-86-2 (244 pgs). |
| AD B100211 | Contract Law Seminar Problems/JAGS-ADK-86-1 (65 pgs). |

Legal Assistance

- | | |
|------------|---|
| AD A174511 | Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-86-10 (253 pgs). |
| AD B116100 | Legal Assistance Consumer Law Guide/JAGS-ADA-87-13 (614 pgs). |
| AD B116101 | Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs). |
| AD B116102 | Legal Assistance Office Administration Guide/JAGS-ADA-87-11 (249 pgs). |
| AD B116097 | Legal Assistance Real Property Guide/JAGS-ADA-87-14 (414 pgs). |
| AD A174549 | All States Marriage & Divorce Guide/JAGS-ADA-84-3 (208 pgs). |
| AD B089092 | All States Guide to State Notarial Laws/JAGS-ADA-85-2 (56 pgs). |
| AD B093771 | All States Law Summary, Vol I/JAGS-ADA-87-5 (467 pgs). |
| AD B094235 | All States Law Summary, Vol II/JAGS-ADA-87-6 (417 pgs). |
| AD B114054 | All States Law Summary, Vol III/JAGS-ADA-87-7 (450 pgs). |
| AD B090988 | Legal Assistance Deskbook, Vol I/JAGS-ADA-85-3 (760 pgs). |
| AD B090989 | Legal Assistance Deskbook, Vol II/JAGS-ADA-85-4 (590 pgs). |
| AD B124120 | Model Tax Assistance Program/JAGS-ADA-88-2 (65 pgs). |
| AD B124194 | 1988 Legal Assistance Update/JAGS-ADA-88-1 |
| AD B092128 | USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs). |
| AD B095857 | Proactive Law Materials/JAGS-ADA-85-9 (226 pgs). |
| AD B116103 | Legal Assistance Preventive Law Series/JAGS-ADA-87-10 (205 pgs). |
| AD B116099 | Legal Assistance Tax Information Series/JAGS-ADA-87-9 (121 pgs). |

Claims

- | | |
|------------|---|
| AD B108054 | Claims Programmed Text/JAGS-ADA-87-2 (119 pgs). |
|------------|---|

Administrative and Civil Law

- | | |
|------------|---|
| AD B087842 | Environmental Law/JAGS-ADA-84-5 (176 pgs). |
| AD B087849 | AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-86-4 (40 pgs). |
| AD B087848 | Military Aid to Law Enforcement/JAGS-ADA-81-7 (76 pgs). |
| AD B100235 | Government Information Practices/JAGS-ADA-86-2 (345 pgs). |
| AD B100251 | Law of Military Installations/JAGS-ADA-86-1 (298 pgs). |
| AD B108016 | Defensive Federal Litigation/JAGS-ADA-87-1 (377 pgs). |
| AD B107990 | Reports of Survey and Line of Duty Determination/JAGS-ADA-87-3 (110 pgs). |

AD B100675 Practical Exercises in Administrative and Civil Law and Management/JAGS-ADA-86-9 (146 pgs).

Labor Law

AD B087845 Law of Federal Employment/JAGS-ADA-84-11 (339 pgs).

AD B087846 Law of Federal Labor-Management Relations/JAGS-ADA-84-12 (321 pgs).

Developments, Doctrine & Literature

AD B086999 Operational Law Handbook/JAGS-DD-84-1 (55 pgs).

AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs).

Criminal Law

AD B095869 Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS-ADC-85-3 (216 pgs).

AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 10-64	Joint Field Operating Agencies of the Surgeon General of the U.S.		16 Aug 88
AR 210-60	Personal Check Cashing Control		26 Aug 88
AR 220-1	Unit Status Reporting		30 Aug 88
AR 600-20	Army Command Policy		12 Sep 88
AR 710-2	Inventory Management	101	27 Aug 88
DA Pam 710-2-1	Using Unit Supply System	101	27 Aug 88
Cir 1-88-1	1988 Contemporary Military Reading List		

3. Articles

The following civilian law review articles may be of use to judge advocates.

- Bernstein, *Charting the Bicentennial*, 87 Colum. L. Rev. 1565 (1987).
- Finger, *The United Nations and International Terrorism*, 10 Jerusalem J. Int'l Rel. 12 (1988).
- Gibney, *A "Well-Founded Fear" of Persecution*, 10 Hum. Rts. Q. 109 (1988).
- Kleinman, *Disappearances in Latin America: A Human Rights Perspective*, 19 N.Y.U. J. Int'l L. & Pol. 1033 (1987).
- Leich, *Contemporary Practices of the United States Relating to International Law*, 82 Am. J. Int'l L. 103 (1988).
- McFadden, *The Second Review Conference of the Biological Weapons Convention: One Step Forward, Many More to Go*, 24 Stan. J. Int'l L. 85 (1987).
- Ostrihansky, *Chambers of the International Court of Justice*, 37 Int'l & Comp. L.Q. 30 (1988).
- Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610 (1988).

U.S. Postal Service STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION <small>Required by 39 U.S.C. 3685</small>									
1A. TITLE OF PUBLICATION The Army Lawyer					1B. PUBLICATION NO. <div style="display: flex; justify-content: space-around; font-family: monospace;">03641287</div>			2. DATE OF FILING 19 September 1988	
3. FREQUENCY OF ISSUE Monthly					3A. NO. OF ISSUES PUBLISHED ANNUALLY Twelve			3B. ANNUAL SUBSCRIPTION PRICE \$24.00 domestic \$70.00 foreign	
4. COMPLETE MAILING ADDRESS OF KNOWN OFFICE OF PUBLICATION (Street, City, County, State and ZIP+4 Code) (Not printers) The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781									
5. COMPLETE MAILING ADDRESS OF THE HEADQUARTERS OF GENERAL BUSINESS OFFICES OF THE PUBLISHER (Not printer) Headquarters, Department of the Army, Washington, D.C. 20310									
6. FULL NAMES AND COMPLETE MAILING ADDRESS OF PUBLISHER, EDITOR, AND MANAGING EDITOR (This item MUST NOT be blank)									
PUBLISHER (Name and Complete Mailing Address) Colonel Thomas M. Crean, Commandant, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781									
EDITOR (Name and Complete Mailing Address) Captain Matthew E. Winter, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781									
MANAGING EDITOR (Name and Complete Mailing Address) Captain Matthew E. Winter, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781									
7. OWNER (If owned by a corporation, its name and address must be stated and also immediately thereunder the names and addresses of stockholders owning or holding 1 percent or more of total amount of stock. If not owned by a corporation, the names and addresses of the individual owners must be given. If owned by a partnership or other unincorporated firm, its name and address, as well as that of each individual must be given. If the publication is published by a nonprofit organization, its name and address must be stated.) (Item must be completed.)									
FULL NAME					COMPLETE MAILING ADDRESS				
Headquarters, Department of the Army					Washington, D.C. 20310				
8. KNOWN BONDHOLDERS, MORTGAGEES, AND OTHER SECURITY HOLDERS OWNING OR HOLDING 1 PERCENT OR MORE OF TOTAL AMOUNT OF BONDS, MORTGAGES OR OTHER SECURITIES (If there are none, so state)									
FULL NAME					COMPLETE MAILING ADDRESS				
None									
9. FOR COMPLETION BY NONPROFIT ORGANIZATIONS AUTHORIZED TO MAIL AT SPECIAL RATES (Section 423.12 DMM only) The purpose, function, and nonprofit status of this organization and the exempt status for Federal income tax purposes (Check one)									
<div style="display: flex; justify-content: space-between;"> <div> <input type="checkbox"/> (1) HAS NOT CHANGED DURING PRECEDING 12 MONTHS </div> <div> <input type="checkbox"/> (2) HAS CHANGED DURING PRECEDING 12 MONTHS </div> <div> <small>(If changed, publisher must submit explanation of change with this statement.)</small> </div> </div>									
10. EXTENT AND NATURE OF CIRCULATION <small>(See instructions on reverse side)</small>					AVERAGE NO. COPIES EACH ISSUE DURING PRECEDING 12 MONTHS		ACTUAL NO. COPIES OF SINGLE ISSUE PUBLISHED NEAREST TO FILING DATE		
A. TOTAL NO. COPIES (Net Press Run)					7942		7943		
B. PAID AND/OR REQUESTED CIRCULATION									
1. Sales through dealers and carriers, street vendors and counter sales					0		0		
2. Mail Subscription (Paid and/or requested)					200		200		
C. TOTAL PAID AND/OR REQUESTED CIRCULATION <small>(Sum of 10B1 and 10B2)</small>					200		200		
D. FREE DISTRIBUTION BY MAIL, CARRIER OR OTHER MEANS SAMPLES, COMPLIMENTARY, AND OTHER FREE COPIES					7631		7639		
E. TOTAL DISTRIBUTION (Sum of C and D)					7831		7839		
F. COPIES NOT DISTRIBUTED									
1. Office use, left over, unaccounted, spoiled after printing					111		104		
2. Return from News Agents					0		0		
G. TOTAL (Sum of E, F1 and 2—should equal net press run shown in A)					7942		7943		
11. I certify that the statements made by me above are correct and complete					SIGNATURE AND TITLE OF EDITOR, PUBLISHER, BUSINESS MANAGER, OR OWNER Matthew E. Winter, Captain, U.S. Army, Editor				

PS Form 3526, July 1984

(See instruction on reverse)

By Order of the Secretary of the Army:

CARL E. VUONO
General, United States Army
Chief of Staff

Official:

Distribution. Special.

WILLIAM J. MEEHAN II
Brigadier General, United States Army
The Adjutant General

Department of the Army
The Judge Advocate General's School
US Army
ATTN: JAGS-DDL
Charlottesville, VA 22903-1781

SECOND CLASS MAIL
POSTAGE AND FEES PAID
DEPARTMENT OF THE ARMY
ISSN 0364-1287

Official Business
Penalty for Private Use \$300